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Apples and Oranges and Olives? Oh my!

FELLERS, THE SIXTH AMENDMENT, AND THE FRUIT OF THE POISONOUS TREE DOCTRINE

I. INTRODUCTION

In the 2003-2004 term, the Supreme Court decided three cases¹ involving the admissibility of derivative evidence obtained through the use of unwarned statements, thus making this period a unique and important one for criminal defendants and their rights against self-incrimination and to counsel, as protected by the Fifth and Sixth Amendments.² This Comment focuses on the first of these decisions, *Fellers v.*

¹ *Fellers v. United States*, 540 U.S. 519 (2004); *United States v. Patane*, 124 S. Ct. 2620 (2004); and *Missouri v. Seibert*, 124 S. Ct. 2601 (2004).

² In contrast, in its 2002-2003 term the Court heard only one case in which the right against self-incrimination was the primary issue: *Chavez v. Martinez*, 538 U.S. 760 (2003). Lt. Col. David H. Robertson, *Self-Incrimination: Big Changes in the Wind*, ARMY LAW., May 2004, at 37, 37. In its 2004-2005 term the Court did not hear any cases in which the right against self-incrimination was the primary issue. Medill School of Journalism, On the Docket: U.S. Supreme Court 2004-2005 Case List, at <http://docket.medill.northwestern.edu/archives/000969> (last visited Nov. 2, 2005). Similarly, the Court has one case, *Maryland v. Blake*, on its docket for the 2005-06 term concerning self-incrimination. Medill School of Journalism, *supra*, at <http://docket.medill.northwestern.edu/archives/002315.php> (last visited Nov. 2, 2005). Two of the 2003-2004 decisions significantly impacted the Fifth Amendment derivative evidence rule. In *Patane*, 124 S. Ct. at 2630, the Court held that the failure to provide *Miranda* warnings does not require suppression of non-testimonial fruits where the initial incriminating statement was made voluntarily. The *Patane* decision reaffirmed the current Court's aversion to the Fifth Amendment fruits doctrine. See *Oregon v. Elstad*, 470 U.S. 298, 307-09 (1985); *Michigan v. Tucker*, 417 U.S. 433, 446, 451-52 (1974). In *Seibert*, 124 S. Ct. at 2613, the Court suppressed a confession obtained through the "question-first" interrogation technique, which involves questioning a suspect in successive unwarned and warned phases. The technique creates precisely the type of environment that the *Miranda* Court found likely to impede a defendant's ability to make a free and rational choice about whether to speak to the police. *Id.* at 2607. *Seibert* limited the reach of the Court's prior holding in *Oregon v. Elstad* thus resolving a split among the Courts of Appeal. *Id.* at 2607, 2611. In *Elstad*, discussed herein, the Court held that the Fifth Amendment does not require suppression of a confession made after proper *Miranda* warnings and a voluntary waiver of rights solely because the police had obtained an earlier but unwarned statement from the suspect. *Elstad*, 470 U.S. at 318. Some courts had read *Elstad* as essentially admitting all subsequent confessions while other courts suppressed statements if it was clear that the police had deliberately evaded *Miranda*. *Id.* at 2607. The *Seibert* decision reinforced the constitutional status of the procedural safeguards established in *Miranda*. *Id.* at 2605.

United States.³ There, the Court reversed the Eighth Circuit's decision and held that the absence of an interrogation does not foreclose a petitioner's claim that his jailhouse statements should be suppressed as the fruits of a statement improperly taken from him at his home.⁴ Specifically, the Court found that the officers, who went to the accused's home after he had been indicted for conspiracy to distribute methamphetamine, violated the defendant's Sixth Amendment right to counsel when they deliberately elicited information from him about his role in the crime in the absence of counsel or a valid waiver of counsel.⁵ Since the Eighth Circuit held that the petitioner's Sixth Amendment rights had not been violated, it applied Fifth Amendment standards to determine whether the accused's inculpatory statements made at the jailhouse should be suppressed as the products of prior, illegally obtained statements.⁶ Typically, evidence obtained through a violation of a defendant's constitutional rights cannot be admitted at trial.⁷ An established exception to the traditional exclusionary rule, known as the "*Elstad* exception," allows derivative evidence⁸ obtained after unwarned,⁹ yet uncoercive

³ 540 U.S. 519 (2004).

⁴ *Id.* at 521.

⁵ *Fellers*, 540 U.S. at 524-25.

⁶ *Id.* at 525.

⁷ The Court stated in *Mapp v. Ohio*:

[A] conviction . . . the foundation of which is evidence obtained in disregard of liberties deemed fundamental by the Constitution, cannot stand And this Court has on Constitutional grounds, set aside convictions, both in the federal and state courts, which were based upon confessions 'secured by protracted and repeated questioning of ignorant and untutored persons in whose minds the power of officers was greatly magnified' . . . or 'who have been lawfully held incommunicado without advice of friends or counsel'

367 U.S. 643, 649-51 (1961) (quoting *McNabb v. United States*, 318 U.S. 332, 339-40 (1943)).

⁸ Derivative evidence or, more commonly, "fruits," refers to evidence one step removed from illegally obtained evidence, as opposed to the evidence that resulted directly from a constitutional violation. The exclusionary rule prohibits the use of either form of evidence. *Nardone v. United States*, 308 U.S. 338, 340-41 (1939); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920). So, for example, imagine that an individual is illegally arrested and confesses. The confession leads police to uncover other evidence, like a weapon, witness, or dead body. The confession is primary evidence, but the subsequently discovered evidence (i.e. the weapon or the body) is considered derivative evidence. As a tool to determine whether a particular piece of evidence derived from an initial illegality, the Court coined the metaphor "fruit of the poisonous tree." See *Nardone*, 308 U.S. at 341. A prime illustration of the derivative evidence rule at work can be found in *Wong Sun v. United States*, 371 U.S. 471 (1963).

questioning¹⁰ to be used in the prosecution's case in chief as long as the suspect was later advised of and waived his *Miranda* rights.¹¹ Relying on the *Elstad* exception, the Eighth Circuit affirmed the district court's decision to admit Fellers' second statement.¹²

In its review of the *Fellers* case, the Supreme Court determined that the police officers' conduct had in fact violated the petitioner's Sixth Amendment rights, but the Court did not decide whether the exception announced in *Elstad* would apply under the circumstances—where a suspect makes incriminating statements after validly waiving his right to counsel despite earlier police questioning in violation of the Sixth Amendment.¹³ The Court remanded the case so that the Eighth Circuit could conduct its exclusionary analysis based on the Sixth Amendment right to counsel violation.¹⁴ On February 15, 2005, the Eighth Circuit, still relying on the *Elstad* exception, affirmed Fellers' conviction once again.¹⁵

The Eighth Circuit's decision to introduce and apply an exclusionary rule exception specifically created to deal with violations of the Fifth Amendment to a Sixth Amendment violation has significant and controversial implications for the future of Sixth Amendment jurisprudence and ultimately for

⁹ Once in police custody, a suspect must be informed that he has the right to remain silent, that anything said can be used against him at trial, and that he has a right to counsel. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). The aforementioned rights are commonly referred to as "*Miranda* rights" and any statement made by a suspect prior to being given these warnings is considered "unwarned." *See Id.* at 468.

¹⁰ Non-coercive means that the suspect made the statement knowingly and voluntarily. *Id.* at 461-62.

¹¹ *Oregon v. Elstad*, 470 U.S. 298, 308-09 (1985). In this case, Elstad gave a *Miranda*-defective confession in his home, then received warnings at the jailhouse, signed a waiver, and made a formal confession. *Id.* at 300-02. His second confession, which would traditionally have been excluded under the fruits of the poisonous tree doctrine, was admitted because the Court found that the officer remedied his initial failure to provide Elstad with his *Miranda* warnings. *Id.* at 308-09. Thus the only remaining inquiry was whether Elstad had made a valid waiver and given an uncoerced confession. *See id.* The Court found that he did. *Id.* at 315.

¹² *Fellers v. United States*, 540 U.S. 519, 525 (2004).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *United States v. Fellers*, 397 F.3d 1090, 1092 (8th Cir. 2005) ("Fellers argues that *Elstad* does not apply to violations of the Sixth Amendment because the *Elstad* rule was never designed to deal with actual violations of the Constitution. In addition, Fellers argues that *Elstad*—which was crafted to serve the Fifth Amendment—is inapplicable because it is ill-suited to serve the distinct concerns raised by the Sixth Amendment and because violations of the *Miranda* rule are fundamentally different from the Sixth Amendment violation at issue in this case. We disagree.").

the rights of criminal defendants. By analogizing the Fifth and Sixth Amendment rights to counsel, instead of distinguishing them, the Eighth Circuit has rejected the view of most legal scholars and lower courts that the right to counsel under the Sixth Amendment is a more protected right. Equating the Sixth Amendment right to counsel with the lesser-protected and narrower Fifth Amendment right leaves the Sixth Amendment right to counsel susceptible to further weakening.

The most controversial aspect of the *Fellers* decision is the exclusionary remedy that must be applied if the Sixth Amendment violation at issue falls outside of the *Elstad* exception.¹⁶ The exclusionary rule, a long-settled yet oft-debated rule, requires evidence obtained in violation of a defendant's constitutional rights to be excluded at trial.¹⁷ Since first announcing the rule, however, the Court has significantly narrowed the rule's scope, citing the debatable merits of excluding probative evidence.¹⁸ The main way the Court has softened the rule's impact is by recognizing exceptions that allow illegally obtained evidence and its fruits to be used at trial. The exception established in *Elstad* severely limits the fruits of the poisonous tree doctrine in the Fifth Amendment context and the Eighth Circuit decision validating *Elstad's* applicability in the Sixth Amendment context will have the same effect. So, the issue remains: did cutting down the fruit of the poisonous tree growing in the Sixth Amendment orchard go too far? Can the administration of *Miranda* warnings truly

¹⁶ See *infra* notes 16, 17.

¹⁷ It is a well-established principle that all evidence derived from a constitutional violation is subject to exclusion. See *Wong Sun v. United States*, 371 U.S. 471, 484 (1963). The rule has been a divisive issue since the Court first announced and applied it as a remedy for Fourth Amendment violations in *Weeks v. United States*, 232 U.S. 383, 398 (1914). "The ongoing discussion of the merits of the exclusionary rule is as old as the rule itself." Randy E. Barnett, *Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice*, 32 EMORY L.J. 937, 938 (1983).

¹⁸ One of the rule's most venerable critics is Justice Cardozo, who is oft quoted as deriding the exclusionary doctrine because it allows "[t]he criminal . . . to go free because the constable has blundered." *People v. Dafore*, 150 N.E. 585, 587 (N.Y. 1926). Opponents are quick to point out that the exclusionary rule is wholly court made, i.e. there is no Constitutional language mandating exclusion. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 785 (1994). Furthermore, the exclusionary rule differs from other rules of evidence, which are designed to exclude only unreliable and overly prejudicial evidence. In contrast, the Fourth Amendment exclusionary rule purposely excludes reliable evidence. See Barnett, *supra* note 17, at 941. Finally, opponents argue that the remedy lacks proportionality—whether the police infraction is egregious or minor, there is the same result. See Sharon L. Davies, *The Penalty of Exclusion—A Price or Sanction?*, 73 S. CAL. L. REV. 1275, 1318 (2000).

sanitize the fruits of a Sixth Amendment violation or is equating *Miranda* to the Sixth Amendment like comparing apples to oranges?

This Comment argues that the Eighth Circuit erred in applying the *Elstad* exception to the *Fellers* case because a *Miranda* warning simply is not enough to remedy a Sixth Amendment violation even if it is sufficient to protect the Fifth Amendment entitlement to counsel. The Sixth Amendment right to counsel's genesis, purpose, and Supreme Court jurisprudence have accorded it a higher degree of protection than its Fifth Amendment counterpart. Moreover, the Sixth Amendment exclusionary rule, as opposed to the Fifth Amendment exclusionary rule, is a personal right that is inextricably tied to the promise of counsel. As such, the rule serves a purpose other than deterrence; it is meant to underscore and reinforce the right. Given the nature of the Sixth Amendment right, application of fruits principles requires suppression of any evidence that is derived from a violation of that right. This Comment also asserts that, in general, the *Elstad* exception is not one that should be extended into the Sixth Amendment realm, but rather limited to the Fifth Amendment context. Allowing the government to use evidence derived from an inculpatory statement, voluntary or not, made in violation of the Sixth Amendment right to counsel, substantially undermines the Amendment's protections. Any weakening of the right to assistance of counsel essentially renders a defendant's right to a fair trial an empty one. Yet it is the ability to ensure a fair trial for all defendants that is the foundation of our entire criminal justice system and that without which our system loses all integrity. As the facts of *Fellers* demonstrate, this slippery slope argument is not merely theoretical hypothesizing, but an unsettling reality.

Part II of this Comment explains the backgrounds of *Oregon v. Elstad* and *United States v. Fellers*. Part III explores the differences between the Fifth and Sixth Amendment rights to counsel, including their purposes, waiver requirements, and violations. Part IV sketches a history of the exclusionary rule and its application in the Fourth, Fifth, and Sixth Amendment contexts and traces the development of the derivative-evidence rule. Part V examines the Court's decision in *Fellers v. United States* and distinguishes it from the facts and reasoning of *Oregon v. Elstad*. Finally, Part VI concludes that the *Elstad* exception is inapplicable in a Sixth Amendment context and

asserts that while the Fifth and Sixth Amendment rights to counsel sometimes overlap, they have fundamentally different functions that are important to distinguish, and therefore, the rights cannot and should not be equated as a per se rule.

II. BACKGROUND

A. *The Facts of Elstad*

After a home was burglarized in Polk County, Oregon, the police received a tip implicating Michael Elstad, the next door neighbor.¹⁹ Two officers went to Elstad's home with a warrant for his arrest.²⁰ Elstad's mother answered the door, let the officers in and brought them to her son's room where he was lying on his bed listening to the radio.²¹ The officers asked Elstad to go into the living room with them.²² Thereafter, one officer took Mrs. Elstad into the kitchen to explain the state of affairs while the other officer remained in the living room with Michael Elstad.²³ The officer asked him if he knew why the officers were there. Elstad responded, "no."²⁴ The officer then asked if he knew a person named Gross.²⁵ Elstad replied that he knew Gross and that he had heard there was a burglary at the Gross home.²⁶ The officer then told Elstad that he believed Elstad was involved in that burglary.²⁷ Elstad responded, "Yes, I was there."²⁸ The officers then arrested Elstad and took him to the police station.²⁹ Approximately one hour later, while at the police station, the police informed Elstad of his *Miranda* rights.³⁰ Elstad indicated that he understood those rights and wanted to speak with the officers.³¹ He then proceeded to give a full statement, typed and signed by Elstad and both officers, explaining his role in the robbery.³²

¹⁹ *Oregon v. Elstad*, 470 U.S. 298, 300 (1985).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* at 300-01.

²⁴ *Id.* at 301.

²⁵ *Elstad*, 470 U.S. at 301.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Elstad*, 470 U.S. at 301.

³² *Id.*

Elstad was charged with first-degree burglary and tried by a Circuit Court judge.³³ He moved to suppress his oral statement and signed confession, arguing that the statement he had made in response to questioning at his house tainted his subsequent confession because it “let the cat out of the bag.”³⁴ The lower court refused to suppress the second written statement, however, because Elstad had made it freely, voluntarily, and knowingly and after a valid waiver of his *Miranda* rights.³⁵ Elstad was found guilty. He appealed his conviction, but the Supreme Court ultimately affirmed it.³⁶

B. The Facts of Fellers

On February 24, 2000, a grand jury indicted Fellers for conspiracy to distribute methamphetamine.³⁷ Two officers, Sergeant Michael Garnett and Sheriff Jeff Bliemeister, went to the defendant’s home in Lincoln, Nebraska to arrest him.³⁸ When Fellers answered the door, the two officers identified themselves and asked if they could come in.³⁹ Fellers invited the officers into his home, and they advised him that they had come to discuss his involvement in methamphetamine distribution.⁴⁰ They also informed Fellers that he had been indicted and that the indictment referred to his involvement with four individuals, whom they then named.⁴¹ Fellers told the officers that he knew those individuals and had used drugs with them.⁴² After approximately fifteen minutes, the officers took the defendant to the county jail.⁴³ At the jailhouse, the officers informed Fellers of his *Miranda* rights for the first time.⁴⁴ Fellers waived his rights, signed a waiver form, and proceeded to reiterate the inculpatory statements he had made in his home.⁴⁵

³³ *Id.* at 302.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 300.

³⁷ *Fellers v. United States*, 540 U.S. 519, 521 (2004).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Fellers*, 540 U.S. at 521.

⁴⁴ *Id.*

⁴⁵ *Id.* at 521-22.

Before trial, Fellers moved to suppress the inculpatory statements he made in his home and at the jail.⁴⁶ A magistrate judge recommended that the statements be suppressed because the officers had failed to read the defendant his *Miranda* rights in the home, thus making the jailhouse statements fruits of this prior violation.⁴⁷ The District Court, however, suppressed the unwarned statements Fellers made at his house, but admitted the jailhouse statements made later pursuant to the *Elstad* exception. The court reasoned that Fellers had knowingly and voluntarily waived his *Miranda* rights before making the statements.⁴⁸ Fellers was convicted at trial.

On appeal, Fellers argued that the jailhouse statements should have been suppressed as fruits of the statements obtained in his home in violation of his Sixth Amendment rights.⁴⁹ The Court of Appeals affirmed his conviction, concluding that the officers did not violate Fellers' Sixth Amendment rights because the officers' questions at his home did not amount to an interrogation, and therefore, the district court properly admitted the jailhouse statements under *Elstad*.⁵⁰

III. FIFTH VERSUS SIXTH AMENDMENT RIGHTS TO COUNSEL

The issue the Supreme Court left open in *Fellers* is whether the *Elstad* exception, which the Eighth Circuit applied to a procedural *Miranda* violation, also applies in the context of a Sixth Amendment violation. In order to analyze this question, it is essential to understand the main differences between the Fifth and Sixth Amendment rights to counsel and their respective exclusionary rules. The following section discusses the sources of, rationales behind, and requisites for compliance with each Amendment.

⁴⁶ *Id.* at 522.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Fellers*, 540 U.S. at 522.

⁵⁰ *Id.* at 522-23.

A. *The Fifth Amendment Right to Counsel*

1. Purpose

The Fifth Amendment right to counsel furthers the goal of assuring trustworthy evidence by ensuring that a suspect is guarded from the pressures of self-incrimination during police questioning.⁵¹ Notably, though, the Fifth Amendment does not specifically refer to the entitlement to legal counsel.⁵² However, in *Miranda v. Arizona*,⁵³ the Court found an independent source for the right to counsel within the Fifth Amendment privilege against self-incrimination.⁵⁴ Concerned with ensuring reliable—meaning uncoerced—jailhouse confessions, the Court held that prior to any custodial questioning, a suspect must be warned of his right to counsel, among others.⁵⁵ The Court believed that this warning was necessary to combat the “inherently compelling pressures” present at an in-custody interrogation—pressures that inevitably heighten the risk that an individual will feel compelled to incriminate himself.⁵⁶ The Court described the primary ways that the presence of counsel at an interrogation helps the accused: an attorney can (i) mitigate the dangers of untrustworthiness, (ii) reduce police coercion, and (iii) guarantee the accuracy of the accused’s statement.⁵⁷ Thus, the core protection of the Fifth Amendment is the right against self-incrimination, not the right to assistance of counsel.⁵⁸ Assistance of counsel in this context is an ancillary measure designed to protect the broader right by providing a buffer between the accused and the often coercive

⁵¹ *Oregon v. Elstad*, 470 U.S. 298, 308 (1985).

⁵² Rather, the Fifth Amendment states that no person “shall be compelled in any criminal case to be a witness against himself.” U.S. CONST. amend. V.

⁵³ 384 U.S. 436 (1966). *Miranda* was a group of consolidated cases in which the Court determined the admissibility of self-incriminating statements obtained from defendants questioned while in custody, but without an effective warning of their rights at the outset of the interrogation process. The Court held that the prosecution may not use statements, exculpatory or inculpatory, obtained from custodial interrogation of the defendant “unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.” *Id.* at 444.

⁵⁴ *See id.* at 469.

⁵⁵ *Id.* at 476.

⁵⁶ *Id.* at 467.

⁵⁷ *Id.* at 470.

⁵⁸ The right to have counsel present at the interrogation, the Court wrote, is “indispensable to the protection of the Fifth Amendment privilege.” *Id.* at 469.

forces of an interrogation by government officials that might force a suspect to confess his guilt.⁵⁹

2. When the Right Attaches

The right applies in a very limited setting. In order to invoke the Fifth Amendment right to counsel, a suspect must be in custody⁶⁰ and under interrogation.⁶¹ As the *Miranda* court stressed, it is the confluence of these two factors that makes counsel's compulsion-dispelling presence, or at least the right to ask for it, essential.⁶²

3. Waiver

A defendant may waive his *Miranda* rights, as long as he does so "voluntarily, knowingly, and intelligently."⁶³ Once a suspect invokes his right to counsel, however, the interrogation, no matter what point it is at, must cease until the suspect has had an opportunity to confer with an attorney.⁶⁴ Any statement taken after a suspect requests counsel is presumed to be coerced and is inadmissible at trial.⁶⁵ In order to rebut the presumption of coercion, the *Miranda* Court stated that the government has the "heavy burden" of demonstrating

⁵⁹ See *Dickerson v. United States*, 530 U.S. 428, 435 (2000); *Duckworth v. Egan*, 492 U.S. 195, 203 (1989); *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987); *New York v. Quarles*, 467 U.S. 649, 653-54 (1974); *Miranda v. Arizona*, 384 U.S. 436, 469-70 (1966).

⁶⁰ A suspect is in custody when his freedom of action is curtailed in any significant way. *Miranda*, 384 U.S. at 467. See also *Berkemer v. McCarty*, 468 U.S. 420, 441 (1984) (admitting inculpatory statements made after the defendant's car was pulled over because the initial stop of the car did not place the defendant in custody).

⁶¹ See *Miranda*, 384 U.S. at 444 (defining interrogation as initiated questioning by the police after a person has been taken into custody or otherwise deprived of their freedom in some significant way); *Rhode Island v. Innis*, 446 U.S. 291, 299-301 (1980) (broadening definition of interrogation set forth in *Miranda* to include situations where there is no express questioning, but psychological persuasion that results in a suspect making inculpatory statements).

⁶² *Miranda*, 384 U.S. at 467. It is important to note that being questioned at a police station does not necessarily mean that someone is in custody. *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977). Likewise, answering questions in a police station while in custody does not necessarily constitute interrogation. *Arizona v. Mauro*, 481 U.S. 520, 527 (1987). Both are fact specific inquiries.

⁶³ *Miranda*, 384 U.S. at 444. Here, the Court imported the Sixth Amendment waiver standard announced in *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), which established a high threshold for demonstrating a waiver of constitutional rights.

⁶⁴ *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966).

⁶⁵ *Id.* at 474 (explaining that once a defendant has indicated his desire to exercise his Fifth Amendment privilege, any subsequent statement "cannot be other than an act of compulsion, subtle or otherwise").

that a suspect knowingly and intelligently waived his privilege against self-incrimination and his right to counsel.⁶⁶

While ostensibly applying this exacting standard, in practice the Court has actually employed a low standard for waiver of the Fifth Amendment right to counsel.⁶⁷ In general, the Court's jurisprudence has indicated that providing suspects with *Miranda* warnings and obtaining a waiver is a "virtual ticket of admissibility."⁶⁸ The Court has even noted that cases in which a defendant can legitimately argue that his statement was compelled despite receiving *Miranda* warnings are rare.⁶⁹ This is because the Court equates "knowing and intelligent" with simple "awareness" and not necessarily true "informedness."⁷⁰ A suspect is considered aware of his rights as soon as the warning is read.⁷¹ Additionally, while the burden rests with the state to prove a voluntary and knowing waiver, the Court has held that it can do so without evidence of express relinquishment.⁷²

4. Violations

When considering whether the government has violated a suspect's Fifth Amendment right to counsel, the inquiry focuses on whether the suspect felt coerced, not whether the police acted in an intentionally coercive manner.⁷³ Thus, in

⁶⁶ *Id.* at 475 (citing *Escobedo v. Illinois*, 378 U.S. 478, 490 & n.14 (1964); *Johnson*, 304 U.S. at 464 (1938)).

⁶⁷ Meredith B. Halama, Note, *Loss of a Fundamental Right: The Sixth Amendment as a Mere "Prophylactic Rule,"* 1998 U. ILL. L. REV. 1207, 1217. See also James J. Tomkovicz, *Standards for Invocation and Waiver of Counsel in Confession Contexts*, 71 IOWA L. REV. 975, 1045 (1986).

⁶⁸ *Missouri v. Siebert*, 124 S. Ct. 2601, 2608 (2004).

⁶⁹ *Berkemer v. McCarty*, 468 U.S. 420, 433 n.20 (1984).

⁷⁰ The Court does not require states to provide a suspect with all the information that may be useful in making his decision. *Moran v. Burbine*, 475 U.S. 412, 422-23 (1985) (holding that a defendant's Fifth Amendment right to counsel was not violated when police failed to inform him that a lawyer was calling the station trying to contact him). Police are not required to "supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights." *Id.* at 422. See *Oregon v. Elstad*, 470 U.S. 298, 316 (1985); *United States v. Washington*, 431 U.S. 181, 188 (1977).

⁷¹ Halama, *supra* note 67, at 1217.

⁷² *North Carolina v. Butler*, 441 U.S. 369, 372-73 (1979) (holding that "express written or oral statement of waiver . . . is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver," at least in some cases waiver can be inferred from the actions and words of the person interrogated).

⁷³ See *Edwards v. Arizona*, 451 U.S. 477, 482-83, 487 (1981); *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980); *Miranda v. Arizona*, 384 U.S. 436, 475-76 (1966). Most

Miranda, the Court found the “salient characteristics” of a coercive atmosphere to be the incommunicado interrogation of individuals in a police-dominated atmosphere resulting in self-incriminating statements without full warnings of constitutional rights.⁷⁴ In such a situation, suspects are subject to many psychological pressures that could overcome their desire not to speak with the police.⁷⁵

While the *Miranda* doctrine appears to protect a defendant in any situation in which the police exert pressure on him, in actuality the Court has narrowed this construction significantly. In *Rhode Island v. Innis*, the police, while transporting Innis to prison after he had invoked his right to counsel, engaged in a supplicant conversation about the case in front of him.⁷⁶ Specifically, the officers said that they hoped a handicapped child from a nearby school would not find Innis’ discarded weapon and get hurt.⁷⁷ After hearing this conversation, Innis asked the officers to return to the scene of the crime so that he could show them the weapon because he too feared that a child would get hurt.⁷⁸ Despite the presence of the exact type of psychological ploy that the *Miranda* Court had cautioned against, the Court held that the incriminating evidence was properly admitted at trial.⁷⁹ The Court explained that the conversation between the two officers was not an interrogation because it was not directed at Innis, and they could not reasonably have known that Innis would have been susceptible to such an appeal of conscience.⁸⁰ Despite its

recently, in *Missouri v. Seibert*, 124 S. Ct. at 2611, the Court, struck down the question-first method of interrogation, i.e. purposely questioning a suspect in successive unwarned and warned phases, because

a suspect would hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground [of his earlier, unwarned confession] again. A more likely reaction on a suspect’s part would be perplexity about the reason for discussing rights at that point, bewilderment being an unpromising frame of mind for knowledgeable decision.

Id. at *25.

⁷⁴ *Miranda*, 384 U.S. at 445.

⁷⁵ *Id.* at 448-49.

⁷⁶ 446 U.S. 291, 294 (1980).

⁷⁷ *Id.* at 294-95.

⁷⁸ *Id.* at 295.

⁷⁹ *Id.* at 302.

⁸⁰ *Id.* The Court clarified the definition of interrogation as any police action that the police should know is reasonably likely to elicit an incriminating response. *Id.* at 298-302.

constrictive holding in *Innis*, the Court in *Edwards v. Arizona*⁸¹ made clear that once a suspect has invoked his Fifth Amendment right to counsel, all questioning must cease unless initiated by the suspect himself.⁸² A suspect's responses to further questioning after an invocation of the right to counsel cannot be used to cast doubt on that request.⁸³

The most distinctive attribute of a *Miranda* violation, however, is that the Court has held that the unintentional failure to read *Miranda* is not a direct violation of the Fifth Amendment right against self-incrimination.⁸⁴ Rather, this failure merely creates a rebuttable presumption of coercion.⁸⁵ The *Miranda* Court itself explained that the warning was not a "constitutional straightjacket" and invited the legislature to develop equally effective ways to protect the Fifth Amendment privilege.⁸⁶ The Court's initial characterization of *Miranda* provided the opportunity for more conservative courts to cut back significantly on *Miranda*'s protections by creating multiple exceptions to when the rule actually applies.⁸⁷ Each time the Court found a way around *Miranda*, it justified the

⁸¹ 451 U.S. 477 (1981).

⁸² *Id.* at 484-85.

⁸³ *Id.* at 484; *Smith v. Illinois*, 469 U.S. 91, 100 (1984) (stating that "an accused's *postrequest* responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself").

⁸⁴ *See* *United States v. Patane*, 124 S. Ct. 2620, 2628 (2004); *Missouri v. Seibert*, 124 S. Ct. 2601, 2603 (2004); *Chavez v. Martinez*, 538 U.S. 760, 772 (2003); *Dickerson v. United States*, 530 U.S. 428, 440 n.6 (2000). *See also* *Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966) ("[W]hen an individual is taken into custody . . . and is subjected to questioning . . . [p]rocedural safeguards must be employed to protect the privilege [against self-incrimination] and unless other fully effective means are adopted to notify the person of his right[s], . . . [reading *Miranda* is] required.").

⁸⁵ *Oregon v. Elstad*, 470 U.S. 298, 307 (1985).

⁸⁶ *Miranda*, 384 U.S. at 467. The legislature took up the Court's offer shortly thereafter and enacted 18 U.S.C. § 3501, discussed herein, but the Court overruled the Act in 2000. *See Dickerson*, 530 U.S. at 444.

⁸⁷ *See e.g., Patane*, 124 S. Ct. at 2626 (failing to provide a suspect with *Miranda* warnings does not require suppression of physical fruits of the suspect's unwarned by voluntary statements); *Davis v. United States*, 512 U.S. 452, 458-59 (1994) (holding that police officers are free to interrogate a *Mirandized* suspect until that suspect makes an explicit request for counsel); *Elstad*, 470 U.S. at 308 (refusing to employ derivative-evidence rule for a procedural violation of *Miranda*); *New York v. Quarles*, 467 U.S. 649, 655-56 (1984) (establishing the public safety exception); *Oregon v. Hass*, 420 U.S. 714, 722-23 (1980) (expanding impeachment exception to include voluntary responses made after assistance of counsel had been requested); *Michigan v. Tucker*, 417 U.S. 433, 436, 444-45 (1974) (holding that the failure to inform defendant that counsel will be appointed is not a sufficient enough departure to establish compulsion); *Harris v. New York*, 401 U.S. 222, 224-25 (1971) (establishing the impeachment exception).

decision by categorizing *Miranda* as merely a “prophylactic” rule.⁸⁸

The Court’s continuous pairing down of *Miranda* protections came to a head in 2000, when a long-ignored federal law enacted shortly after the *Miranda* decision came down was finally challenged.⁸⁹ 18 U.S.C. § 3501 provided a statutory circumvention of *Miranda* by reinstating the voluntariness standard, which was used prior to *Miranda*, as the test for admissibility of confessions.⁹⁰ In *Dickerson v. United States*, the Court seemed to have only two apparent choices: hold that in fact the *Miranda* safeguards are not constitutionally guaranteed or reject all of the exceptions that had been established on the basis that the *Miranda* safeguards are simply prophylactic. In a surprising and somewhat circular opinion, the Rehnquist Court threw *Miranda* a life-vest of sorts. The Court held that *Miranda* is a “constitutional decision” that cannot be overruled by legislative activity.⁹¹ At the same time, however, the Court upheld all of the previously established exceptions to the exclusionary rule.⁹² In so doing, the Court did not reject previous articulations that *Miranda*’s protections reach broader than the Fifth Amendment right itself.⁹³ Therefore any further extensions of its protections

⁸⁸ *Elstad*, 470 U.S. at 305 (quoting *Tucker*, 417 U.S. at 444); *Quarles*, 467 U.S. at 657. See also *Hass*, 420 U.S. at 721 (noting that “the shield provided by *Miranda* cannot be perverted into a license to use perjury” (quoting *Harris*, 401 U.S. at 226) (internal quotation marks omitted)).

⁸⁹ See *Dickerson*, 530 U.S. 428.

⁹⁰ 18 U.S.C. § 3501. Under section (b)(3) of the statute, the reading of *Miranda* warnings was considered only one factor in the voluntariness determination. *Id.*

⁹¹ *Dickerson*, 530 U.S. at 432.

⁹² See *id.* at 441 (explaining that subsequent “decisions illustrate the principle—not that *Miranda* is not a constitutional rule—but that no constitutional rule is immutable”).

⁹³ See *id.* at 446 (Scalia, J., dissenting) (pointing out that the majority did not go as far as to say that the Fifth Amendment is violated when a statement obtained in violation of *Miranda* is admitted against the accused, but rather ambiguously referred to *Miranda* as “constitutionally based,” having “constitutional underpinnings,” and a “constitutional decision”). See also *United States v. Patane*, 124 S. Ct. 2620, 2627 (2004) (citing *Chavez v. Martinez*, 538 U.S. 760, 778 (2003) (stating that “[b]ut because these prophylactic rules (including the *Miranda* rule) necessarily sweep beyond the actual protections of the Self-Incrimination Clause . . . any further extension of these rules must be justified by its necessity for the protection of the actual right against compelled self-incrimination . . .”)); *Elstad*, 470 U.S. at 306 (stating that “[t]he *Miranda* exclusionary rule . . . sweeps more broadly than the Fifth Amendment itself”).

must be tied closely to the underlying Fifth Amendment privilege.⁹⁴

B. The Sixth Amendment Right to Counsel

1. Purpose

The right to counsel in the Sixth Amendment context serves two main purposes: (i) to minimize the imbalance created in an adversarial system where laymen are prosecuted by a government trained and committed to doing so and (ii) to maintain the fairness and integrity of criminal trials.⁹⁵ In contrast to the Fifth Amendment, the Sixth Amendment explicitly provides for the right to counsel. The Sixth Amendment states in part, that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”⁹⁶ The main principles underlying the entire Amendment are “the protection of innocence and the pursuit of truth,” which has led many legal scholars to describe the Sixth Amendment as “the heartland of constitutional criminal procedure.”⁹⁷ In *Powell v. Alabama*, the Court elaborated on the undeniably important role that the right to counsel plays in the American criminal adversarial system.⁹⁸ The Court held that the right to counsel is a fundamental right, explaining that the right to be heard—essentially the right to a fair trial—is an empty one without the right to assistance of counsel.⁹⁹ Thus, the Sixth Amendment serves a different,

⁹⁴ “If errors are made by law enforcement in administering the prophylactic *Miranda* procedures, they should not breed the same irremediable consequences as police infringement on the Fifth Amendment itself.” *Elstad*, 470 U.S. at 309.

⁹⁵ *Maine v. Moulton*, 474 U.S. 159, 168-70 (1985); *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984); *United States v. Wade*, 388 U.S. 218, 228 (1967); *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

⁹⁶ U.S. CONST. amend. VI.

⁹⁷ Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 641-42 (1996).

⁹⁸ 287 U.S. at 66-69.

⁹⁹ *Id.* In reaching its decision, the Court expounded on why legal expertise is essential in this sort of system:

Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at

arguably more important, function than its Fifth Amendment counterpart.¹⁰⁰ Here, the right serves as a remedy for the imbalance created when ill-equipped defendants must face an organized prosecutorial machine.¹⁰¹ Counsel equalizes the field by providing legal knowledge, skills, and training and by committing himself to putting the accused's best interests first.¹⁰²

2. When the Right Attaches

The right to counsel under the Sixth Amendment is broad.¹⁰³ Two threshold requirements must be met before the Sixth Amendment right to counsel attaches: (i) initiation of adversarial proceedings¹⁰⁴ and (ii) deliberate governmental elicitation of statements.¹⁰⁵ A suspect need not be in custody or feel coerced to trigger the right.¹⁰⁶ It is enough that the individual has been indicted and that government officials attempt to obtain information from him.¹⁰⁷ While a literal

every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Id. at 69 (emphasis added).

¹⁰⁰ Thomas Echikson, *Sixth Amendment—Waiver After Request for Counsel*, 77 J. CRIM. L. & CRIMINOLOGY 775, 783 (1986). Despite the *Powell* Court's clear endorsement of the indispensable nature of the right to assistance of counsel, such a requirement did not apply to the states until nearly thirty years later when *Gideon v. Wainwright*, 372 U.S. 335 (1963), extended the Sixth Amendment right to state courts through the Fourteenth Amendment.

¹⁰¹ See *Gideon*, 372 U.S. at 344-45 (citing *Powell*, 287 U.S. at 68-69); *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938).

¹⁰² See Tomkovicz, *supra* note 66, at 981.

¹⁰³ While this section asserts that the Sixth Amendment right is broader than that of the Fifth, it is also important to note the two ways in which the Court has narrowed the Sixth Amendment right. First, in *McNeil v. Wisconsin*, 501 U.S. 171 (1991), the Court held that a defendant who invoked the right to counsel at a bail hearing did not simultaneously invoke his Fifth Amendment right to counsel. Then, in *Texas v. Cobb*, 532 U.S. 162 (2001), the Court held that the Sixth Amendment right to counsel is offense specific and cannot be invoked once for all future prosecutions, meaning that the police can question represented defendants about other uncharged crimes outside the presence of counsel.

¹⁰⁴ *United States v. Gouveia*, 467 U.S. 180, 188 (1984).

¹⁰⁵ *United States v. Henry*, 447 U.S. 264, 270 (1980); *Brewer v. Williams*, 430 U.S. 387, 436-38 (1977); *Massiah v. United States*, 377 U.S. 201, 206 (1964).

¹⁰⁶ *Massiah*, 377 U.S. at 206.

¹⁰⁷ While the Court has held that using wired informants, *Massiah*, 377 U.S. at 201, 204, or orchestrated jailhouse situations, *Henry*, 447 U.S. at 123-24, designed to elicit information from the defendant triggers the Sixth Amendment right to counsel, neither of these situations would meet the definition of custodial interrogation and thus not trigger the attachment of the Fifth Amendment right. See *supra* notes 61, 78.

reading of the Amendment's text suggests that defendants are only guaranteed counsel at their actual trial, the *Powell* Court expanded the protection's scope;¹⁰⁸ it now attaches at the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment—when a defendant needs the aid of counsel most.¹⁰⁹

In *United States v. Wade*,¹¹⁰ the Court explained that a broad application of the right to counsel was necessary because (i) the Framers of the Bill of Rights had envisioned a broader role for counsel than what had been the prevailing practice in England and (ii) since then, criminal prosecutions have evolved significantly.¹¹¹ The Court also considered how trials have evolved. Whereas at one time evidence against the accused was accumulated at the trial itself, currently, the bulk of the evidence against the defendant is gathered in pretrial proceedings. This significant change allows the results of pretrial proceedings to potentially “settle the accused’s fate . . . reduc[ing] the trial itself to a mere formality.”¹¹² The *Wade* Court made clear that despite the plain wording of the Sixth Amendment, the basic meaning of the Amendment

¹⁰⁸ The *Powell* Court justified its expansion of the right by explaining that the right to counsel at trial is effectively meaningless if its protections can be undone by events that occur before trial. *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

¹⁰⁹ *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (explaining that the point at which the system changes from investigatory to accusatorial is “far from a mere formalism,” it is rather the point at which the adverse positions of the government and defendant have solidified); *Spano v. New York*, 360 U.S. 315, 325 (1959) (pointing out that depriving a formally charged defendant “of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself”); *Powell*, 287 U.S. at 57 (noting that the defendants had been deprived of the right to counsel during the most critical period of the proceedings: “from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation [are] vitally important”).

¹¹⁰ 388 U.S. 218 (1967) (holding that a post-indictment line-up was a critical confrontation by the prosecution for which the defendant was entitled to the assistance of counsel).

¹¹¹ *Id.* at 224.

When the Bill of Rights was adopted, there were no organized police forces as we know them today. The accused confronted the prosecutor and the witnesses against him, and the evidence was marshaled, largely at the trial itself. In contrast, today’s law enforcement machinery involves critical confrontations of the accused by the prosecution at [crucial] pretrial proceedings . . .

Id.

¹¹² *Id.*

guarantees the right to assistance of counsel whenever it is necessary to ensure a meaningful defense.¹¹³

The right to counsel, as defined, applies to all critical stages¹¹⁴ of a prosecution,¹¹⁵ and the Court presumes that a defendant requests counsel at all of these stages.¹¹⁶ Once the right to counsel has attached, the government must honor it, which means that the government must do more than simply not prevent an accused from obtaining assistance of counsel.¹¹⁷ Rather, the State has an affirmative obligation to “respect and preserve” the accused’s choice to seek counsel’s assistance.¹¹⁸ Building on this principle, the Court has held that once the right to assistance of counsel attaches, it is of such importance that the police may no longer employ techniques for eliciting information from an uncounseled defendant that might have been completely proper at an earlier stage of investigation.¹¹⁹

3. Waiver

As previously noted, the Court places a high premium on waivers of Constitutional rights.¹²⁰ In *Johnson v. Zerbst*, the

¹¹³ *Id.* at 225.

¹¹⁴ An event is defined as critical if the presence of counsel is “necessary to preserve the defendant’s basic right to a fair trial as affected by his right . . . to have effective assistance of counsel at the trial itself.” *Id.* at 227. Post-indictment line-ups and post-indictment questioning have both been held to be “critical stages” of a prosecution because of the irreversible potential for prejudice that could result to the defendant without having his counsel present. *Wade*, 388 U.S. at 232; *Massiah v. United States*, 377 U.S. 201, 204 (1964) (citing *Spano*, 360 U.S. at 326). On the other hand, a post-indictment photographic line-up has been held not to be a critical stage of the prosecution. *United States v. Ash*, 413 U.S. 300, 321 (1973).

¹¹⁵ *Wade*, 388 U.S. at 224. *See also Powell*, 287 U.S. at 57 (citing *People ex rel. Burgess v. Riseley*, 66 How. Pr. 67 (N.Y. Sup. Ct. 1883); *Batchelor v. State*, 125 N.E. 773 (Ind. 1920)).

¹¹⁶ *Michigan v. Jackson*, 475 U.S. 625, 633 (1986).

¹¹⁷ *Maine v. Moulton*, 474 U.S. 159, 170-71 (1985).

¹¹⁸ *Id.* The Court went on to say that this means “at the very least, the prosecutor and police have an affirmative obligation not to act in a manner that circumvents . . . the protection afforded by the right to counsel.” *Id.* at 171.

¹¹⁹ *Jackson*, 475 U.S. at 626, 631 (considering the question of whether the police can question a defendant further after he requested counsel at arraignment, but has not yet had the opportunity to consult with counsel, and noting that the reasons for prohibiting interrogation of an uncounseled prisoner who asked for help are even stronger after he has been formally charged).

¹²⁰ “[C]ourts indulge every reasonable presumption against waiver of fundamental constitutional rights and we do not presume acquiescence in the loss of fundamental rights.” *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (quoting *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937)); *Ohio Bell Telephone Co. v. Pub. Util. Comm’n*, 301 U.S. 292, 307 (1937); *Hodges v. Easton*, 106 U.S. 408, 412 (1882) (internal quotation marks omitted).

Court laid out an exacting standard for waiver of Sixth Amendment rights—the “knowing, intelligent, and voluntary” standard, which depends on a case-by-case analysis of the surrounding facts and circumstances of the case, including “the background, experience, and conduct of the accused.”¹²¹ Following *Zerbst*, some lower courts, and even two Supreme Court Justices—albeit in dissents—held that waiver of the Sixth Amendment right to counsel required a higher threshold than waiver of the Fifth Amendment right, despite the fact that the Court used the same standard to describe both.¹²²

The Court has never directly answered this question, but appeared to somewhat strike down the idea of different standards when it held that the *Miranda* warning is sufficient to advise indicted defendants, who have not invoked their right to counsel, of the right and the consequences of relinquishing it.¹²³ The Court based its decision on the fact that an attorney plays essentially the same role in post-indictment questioning as an attorney at a custodial interrogation; therefore, it should not be more difficult to waive one right than the other. The majority stressed, however, that there are limited situations in which a valid waiver might be found under *Miranda* but not under the Sixth Amendment, such as where an attorney was attempting to contact his client or a surreptitious conversation

¹²¹ *Id.* at 464.

¹²² *Patterson v. Illinois*, 487 U.S. 285, 307(1988) (Stevens, J., dissenting) (describing majority’s opinion that the *Miranda* warning makes clear to the accused how counsel could advise him as a “gross understatement of the disadvantage of proceeding without a lawyer” and therefore insufficient basis upon which to make a knowing and intelligent waiver of the Sixth Amendment right to counsel); *Wyrick v. Fields*, 459 U.S. 42, 55 (1982) (Marshall, J., dissenting), *reh’g denied*, 464 U.S. 1020 (1984) (advocating a higher standard for Sixth Amendment waiver); *Felder v. McCotter*, 765 F.2d 1245, 1250 (5th Cir. 1985) (holding that “a waiver of the Sixth Amendment right to counsel requires more than a recital of *Miranda* rights . . .”), *abrogated by Patterson*, 487 U.S. 285; *United States v. Shaw*, 701 F.2d 367, 380 (5th Cir. 1983) *cert. denied*, 465 U.S. 1067 (1984) (stating that because the policies underlying the Fifth and Sixth Amendment rights to counsel are quite distinct, so too are the waiver requirements); *United States v. Brown*, 699 F.2d 585, 589 (2d Cir. 1983) (holding that the *Miranda* warning is not sufficient to waive the Sixth Amendment right to counsel); *United States v. Mohabir*, 624 F.2d 1140, 1147 (2d Cir. 1980) (finding that there is “a higher standard with respect to waiver of the right to counsel that applies when the Sixth Amendment attaches”); *United States v. Satterfield*, 588 F.2d 655, 657 (2d Cir. 1976) (stating that there is a higher waiver standard that applies to the Sixth Amendment right to counsel); *United States v. Callabrax*, 458 F. Supp. 964, 967 (S.D.N.Y. 1978) (following the *Satterfield* holding that more than *Miranda* warnings are needed to inform an indicted defendant about his right to counsel); *United States v. Miller*, 432 F. Supp. 382, 388 (E.D.N.Y. 1977) (noting that statements “which are voluntary under the Fifth Amendment are not necessarily valid when viewed against the higher standard of waiver implicit in the Sixth Amendment”).

¹²³ *Patterson*, 487 U.S. at 292-93.

between an undercover officer and an indicted defendant.¹²⁴ Once a defendant invokes his right to counsel, however, any secret interrogation of the defendant without counsel present contravenes the fundamental rights of a person charged with a crime and any subsequent waiver during police-initiated questioning is invalid.¹²⁵

4. Violations

When considering violations of the Sixth Amendment right to counsel, the Court focuses on the actions of the police as opposed to the perceptions of the accused.¹²⁶ The current approach to Sixth Amendment right to counsel violations came down in *Massiah v. United States*,¹²⁷ in which the Court emphasized the difference between the “deliberate elicitation standard”¹²⁸ and the “functional equivalent of interrogation”¹²⁹ concept.¹³⁰ *Massiah* was indicted for violating federal narcotics laws.¹³¹ He retained a lawyer, pleaded not guilty, and was released on bail.¹³² While out on bail, federal agents obtained incriminating statements from *Massiah* by installing a recording device in his co-defendant’s car.¹³³ The Supreme Court reversed *Massiah*’s conviction, holding that the

¹²⁴ In contrast, under a Fifth Amendment analysis there would be a valid waiver in both situations. *Id.* at 296 n.9.

¹²⁵ Here the Court imports the reasoning of *Edwards v. Arizona*, 451 U.S. 477 (1981), concluding that the “reasons for prohibiting the interrogation of an uncounseled prisoner are even stronger after he has been formally charged with an offense than before.” *Michigan v. Jackson*, 475 U.S. 625, 631 (1986).

¹²⁶ *Fellers v. United States*, 540 U.S. 519, 524 (2004) (questioning an indicted defendant in his home about the crime in question is deliberate elicitation); *Maine v. Moulton*, 474 U.S. 159, 176 (1985) (excluding statements obtained through a wired co-defendant); *United States v. Henry*, 447 U.S. 264, 270, 274-75 (1980) (incriminating statements suppressed where defendant made them to a jailhouse plant because the government’s specific mention of defendant to the undercover informant, who was paid on a contingency fee basis, constituted the prohibited type of affirmative steps to secure incriminating information from a defendant outside the presence of counsel); *Brewer v. Williams*, 430 U.S. 387, 402-04 (1977) (appealing to a particular defendant’s proclivities or weaknesses constitutes deliberate elicitation); *Massiah v. United States*, 377 U.S. 201, 206 (1964) (excluding statements obtained unbeknownst to the defendant through his wired co-defendant).

¹²⁷ 377 U.S. 201 (1964).

¹²⁸ This is the Sixth Amendment right to counsel trigger. *See id.* at 204.

¹²⁹ Used to determine *Miranda* violations. *See Miranda v. Arizona*, 384 U.S. 436, 476 (1966).

¹³⁰ 377 U.S. at 206.

¹³¹ *Id.* at 202.

¹³² *Id.*

¹³³ *Id.* at 202-03.

government could not constitutionally use the defendant's own incriminating words that were deliberately and unknowingly elicited in the absence of counsel against him.¹³⁴

The *Massiah* doctrine laid essentially dormant until nearly thirteen years later in *Brewer v. Williams*.¹³⁵ Williams was suspected of abducting a little girl.¹³⁶ He retained counsel, who advised him that the officers would transport him to another city and that no interrogation would take place, but that if it did, he should not respond until he consulted with an attorney.¹³⁷ While being transported, an officer, knowing that the defendant was schizophrenic and highly religious, began to discuss how a snowstorm was on the way, which would make it nearly impossible to recover the body and allow her parents to give her a proper Christian burial.¹³⁸ Williams then led police to the body.¹³⁹ The Court excluded Williams' incriminating statements because the police officer had deliberately elicited the statements from the defendant in absence of counsel or a waiver of counsel.¹⁴⁰

C. *Two Very Different Rights—Comparing Apples to Oranges*

As the previous discussion intimates, the Fifth and Sixth Amendment rights to counsel are truly two different rights. The rights have different histories, bases, rationales, and purposes. Such differences cannot be ignored. "Analysis of issues and development of workable doctrine concerning the two entitlements must heed the differences in origin, character, and purpose."¹⁴¹ The Sixth Amendment right to counsel was

¹³⁴ *Id.* at 206. In reaching its decision, the Court relied heavily on a concurring opinion in *Spano v. New York*, 360 U.S. 315 (1959). In *Spano*, the Court reversed a state criminal conviction because a confession had been wrongly admitted into evidence against the defendant at his trial. *Id.* at 321. The Court decided the case under the Fourteenth Amendment because of the circumstances under which the confession had been obtained. *Massiah*, 377 U.S. at 321. But, four Justices agreed that the conviction should be reversed solely because the defendant had been indicted and his confession deliberately elicited by police in absence of counsel, thereby violating the Sixth Amendment. *See id.* at 324-25 (Douglas, J., concurring); *Id.* at 326 (Stewart, J., concurring).

¹³⁵ 430 U.S. 387 (1977).

¹³⁶ *Id.* at 390.

¹³⁷ *Id.* at 391.

¹³⁸ *Id.* at 392-93.

¹³⁹ *Id.* at 393.

¹⁴⁰ *Id.* at 397-99.

¹⁴¹ Tomkovicz, *supra* note 66, at 993.

included in the Bill of Rights and has been part of our justice system for over 200 years.¹⁴² The purpose of the Amendment is to preserve the adversarial nature of the criminal justice system by ensuring fairness for the defendant and does so by providing attorneys as zealous advocates of the defendant's best interests. In contrast, the Court created the Fifth Amendment right to counsel thirty years ago. Its purpose is to preserve the accusatorial nature of the criminal justice system, and it does so by allowing counsel to act as a medium between the government and the defendant in a very limited context.

It is not just legal scholars that acknowledge these differences or find them important; the Court has recognized these critical differences as well.¹⁴³ While the Court has at times appeared to blend the two doctrines, such a conclusion is the result of a superficial reading of the overlap in relevant case law.¹⁴⁴ The Court has imported rationales from one context to the other, but before applying such rationales, the Court carefully considers the distinct purpose and objective of each right to counsel to assure that the line of thinking is applicable.¹⁴⁵ In so doing, the Court has demonstrated that the

¹⁴² See U.S. CONST. amend. VI.

¹⁴³ See *Rhode Island v. Innis*, 446 U.S. 291, 300 n.4 (1980) (clarifying that the definitions of interrogation under the Fifth and Sixth Amendments are not necessarily interchangeable since the policies underlying the two constitutional protections are "quite distinct"); *United States v. Henry*, 447 U.S. 264, 282 n.6 (Blackmun, J. dissenting) (justifying his rejection of an objective standard for determining deliberate elicitation under *Massiah* by noting the "quite distinct" policies underlying the Fifth and Sixth Amendments (quoting *Innis*, 446 U.S. at 300 n.4)); *McNeil v. Wisconsin*, 501 U.S. 171, 178 (1991) (stating that the guarantees of right to counsel protect "quite different" interests); *United States v. Wade*, 388 U.S. 218, 226-27 (explaining that the Sixth Amendment provides a right to counsel in a broader sense—when there is no interrogation and no Fifth Amendment applicability). See also *Kirby v. Illinois*, 406 U.S. 682, 688 (1972) (finding that *Miranda* and *Massiah* exclusionary rules stem from "quite different" constitutional guarantees).

¹⁴⁴ See *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (importing the Sixth Amendment waiver standard); *Michigan v. Jackson*, 475 U.S. 625, 636 (1986) (importing bright line rule established in Fifth Amendment context that once a suspect invokes the right to counsel, the interrogation must cease and cannot begin again unless the suspect initiates conversation); *Patterson v. Illinois*, 487 U.S. 285, 296 (1988) (finding that the *Miranda* warning is sufficient to provide the accused with enough information to waive his Fifth or Sixth Amendment right to counsel knowingly and intelligently).

¹⁴⁵ See *Jackson*, 475 U.S. at 631 (rejecting the government's argument that the underlying legal principles of the Fifth and Sixth Amendments make the rule announced in *Edwards* inapplicable in this case and noting that the average person does not appreciate the differences between the two rights to counsel and that the importance of the right to counsel makes the reasoning of *Edwards* even more applicable in the Sixth Amendment context); *Patterson*, 487 U.S. at 293-94 & n.6 (announcing that the *Miranda* warning serves to sufficiently advise defendant of his Sixth Amendment right to counsel, but the Court limited its decision solely to the post-

two counsel entitlements can in no way be equated as a per se rule. In fact, the Court's analysis in the *Miranda*-line of cases has illustrated that the two rights are anything but equal. In announcing the Fifth Amendment right to counsel as a "mere prophylactic rule," the Court has left the right particularly susceptible to judicial weakening.¹⁴⁶ The exceptions already carved out of the rule have caused many scholars to argue that *Miranda* has essentially become a hollow right.¹⁴⁷ In reaffirming *Miranda*'s counsel entitlement as prophylactic and validating all its current exceptions in 2004, the Court has demonstrated its support for treating *Miranda* as a lesser-protected right.¹⁴⁸ In contrast, the Sixth Amendment right to counsel has been expounded as a fundamental right.¹⁴⁹ Instead of contracting its protections, the Court has expanded them from its original context at trial¹⁵⁰ to preliminary hearings,¹⁵¹ sentencings,¹⁵² identification sessions,¹⁵³ initial appearances,¹⁵⁴ arraignments,¹⁵⁵ and post-indictment questioning.¹⁵⁶

IV. FRUIT OF THE POISONOUS TREE DOCTRINE

Criminal procedure requires discussion and analysis of two inter-related topics: the actual substantive constitutional right at issue and the consequence—exclusion—that occurs as a result of violations of that right.¹⁵⁷ Exclusion of evidence and, conversely, restrictions on exclusion, depend upon the

indictment context where counsel's roles under the Fifth and Sixth Amendments are synonymous).

¹⁴⁶ Subsequent decisions have weakened *Miranda*'s protections. See *infra* note 86.

¹⁴⁷ See, e.g., Conor G. Bateman, *Dickerson v. United States: Miranda is Deemed a Constitutional Rule, But Does It Really Matter?*, 55 ARK. L. REV. 177, 179 (2002); Lucian Paul Sbarra, *Swiping the Dust Off of an Old Statute*; United States v. *Dickerson Eliminates the Miranda Warnings*, 35 WAKE FOREST L. REV. 481, 495-97 (2000).

¹⁴⁸ See *Patane*, 124 S. Ct. at 2628-29.

¹⁴⁹ *Powell v. Alabama*, 287 U.S. 45, 68 (1932).

¹⁵⁰ *Gideon v. Wainwright*, 372 U.S. 335, 342-45 (1963).

¹⁵¹ *Coleman v. Alabama*, 399 U.S. 1, 8-9 (1970).

¹⁵² *Mempa v. Rhay*, 389 U.S. 128, 137 (1967).

¹⁵³ *United States v. Wade*, 388 U.S. 218, 237-38 (1967).

¹⁵⁴ *White v. Maryland*, 373 U.S. 59, 60 (1963).

¹⁵⁵ *Hamilton v. Alabama*, 368 U.S. 52, 54-55 (1961).

¹⁵⁶ *Massiah v. United States*, 377 U.S. 201, 206 (1964).

¹⁵⁷ James J. Tomkovicz, *The Massiah Right to Exclusion: Constitutional Premises and Doctrinal Implications*, 67 N.C. L. REV. 751, 751 (1989).

underlying rationale for exclusion.¹⁵⁸ The rationales for exclusion stem from the constitutional rights they protect.¹⁵⁹ A majority of exclusionary rule jurisprudence has occurred in the Fourth Amendment context, where its roots mainly lie.¹⁶⁰ Since it was first announced, the rule has been extended as a general remedy for police misconduct that violates a defendant's constitutional rights. The rule requires suppression at trial of evidence obtained directly or indirectly¹⁶¹ through government violations of the Fourth,¹⁶² Fifth,¹⁶³ or Sixth Amendments.¹⁶⁴ Exceptions have developed to the rule in each context. To determine whether the *Elstad* exception should apply in the Sixth Amendment context, it is necessary to understand the rationales behind suppressing evidence in this realm.

A. *Development*

In *Mapp v. Ohio*,¹⁶⁵ the Court applied the exclusionary rule to state authorities in state courts.¹⁶⁶ In so doing, the

¹⁵⁸ *United States v. Calandra*, 414 U.S. 338, 348 (1974) (stating that “[a]s with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served”). See generally Tomkovicz, *supra* note 154.

¹⁵⁹ See *Nix v. Williams*, 467 U.S. 431, 452-54 (1984) (Stevens, J. concurring).

¹⁶⁰ *Barnett*, *supra* note 16, at 938 n.2.

¹⁶¹ *Wong Sun v. United States*, 371 U.S. 471, 484-85 (1963) (citing *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920)); *Nardone v. United States*, 308 U.S. 338, 340 (1939) (quoting *Nardone v. United States*, 302 U.S. 379, 384 (1947)).

¹⁶² *Weeks v. United States*, 232 U.S. 383, 398 (1914) (applying the exclusionary rule in federal court to evidence obtained through a Fourth Amendment violation), *overruled by* *Mapp v. Ohio*, 367 U.S. 643; *Elkins v. United States*, 364 U.S. 206, 223-24 (1960) (extending the exclusionary doctrine to state officials in federal trials); *Mapp*, 367 U.S. at 655 (applying the exclusionary rule in state court to evidence obtained through a Fourth Amendment violation).

¹⁶³ *Blackburn v. Alabama*, 361 U.S. 199, 205 (1960); *Bram v. United States*, 168 U.S. 532, 564 (1897).

¹⁶⁴ *United States v. Wade*, 388 U.S. 218, 2401-41 (1967); *Massiah v. United States*, 377 U.S. 201, 206 (1964).

¹⁶⁵ 367 U.S. 643 (1961).

¹⁶⁶ *Id.* at 655. The Court first suggested the need for a remedy like exclusion in *Boyd v. United States*, 116 U.S. 616 (1886), a case decided on Fourth and Fifth Amendment grounds. The Court stated in *Boyd* that:

Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony, or of his private papers to be used as evidence to convict him of crime, or to forfeit his goods, is within the condemnation [of the Fourth and Fifth Amendments]

. . . .

Court gave three main justifications for implementing the exclusionary rule: (i) protection of the defendant's rights, (ii) deterrence of police misconduct, and (iii) judicial integrity.¹⁶⁷ Almost immediately after *Mapp*, critics launched an assault against the rule arguing that excluding relevant evidence is fundamentally unfair and too costly.¹⁶⁸ These drawbacks, critics argue, far outweigh the minimal deterrence and judicial integrity actually achieved by exclusion.¹⁶⁹

Arguably in response to this harsh criticism, the Court, in the late 1960s and into the 1970s, also began an attack on the rule. This resulted in a significant narrowing of the rule's scope¹⁷⁰ as well as the formation of multiple exceptions that allow the admission of illegally obtained evidence at trial. To create exceptions to the exclusionary rule, the Court abandoned most of the approach it set forth in *Mapp*. Instead of relying on the three main rationales for exclusion, the Court limited its focus to whether exclusion of the evidence in the case at hand would prevent law enforcement misconduct in the future.¹⁷¹ The Court has identified four main situations in which the exclusionary remedy is not required despite a

. . . constitutional provisions for the security of person and property should be liberally construed.

Id. at 630, 635. It was not until *Weeks*, however, that the Court implemented the rule by excluding letters unreasonably seized from the defendant's home. The *Weeks* holding limited application of the rule to actions of federal officials for use in federal trials. *Id.* at 398. Finally, in *Mapp*, the Court applied the rule to state authorities in state courts. *Mapp*, 367 U.S. at 655.

¹⁶⁷ *Mapp*, 367 U.S. at 659-60.

¹⁶⁸ See sources cited *supra* note 17.

¹⁶⁹ See sources cited *supra* note 17.

¹⁷⁰ In *Rakas v. Illinois*, 439 U.S. 128, 134 (1978), the Court announced a standing requirement that only the victim of the constitutional violation can move for suppression and limited the rule to criminal trials. The exclusionary rule also does not apply in tax actions by the IRS, *United States v. Janis*, 428 U.S. 433, 447, 454 (1976); deportation administrative hearings, *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1049 (1984); or parole revocation hearings, *Board of Probation v. Scott*, 524 U.S. 357, 364 (1998).

¹⁷¹ Interestingly enough, the two places where a defendant's right to exclusion still remains part of the rationale is in violations of the Sixth Amendment context and the Fifth Amendment due process context. See *Arizona v. Mauro*, 481 U.S. 520, 525-26 (1987); *Nix v. Williams*, 467 U.S. 431, 446-47 (1984) (disagreeing on the merits but certainly not rejecting the theory behind defendant's argument that the Sixth Amendment exclusionary rule is designed to protect the right to a fair trial and the integrity of the fact-finding process). See generally *United States v. Wade*, 388 U.S. 218 (extending exclusionary rule to identifications made in absence of counsel because of great unfairness that can occur if accused is put in line-up without a lawyer present).

constitutional violation: (i) when police act in good faith,¹⁷² (ii) when the connection between the illegal conduct and the acquisition of the challenged evidence is so attenuated that it dissipates the taint of the unlawful act,¹⁷³ (iii) when the evidence was obtained through a source independent of the illegality,¹⁷⁴ and (iv) when the evidence inevitably would have been discovered by independent, lawful means.¹⁷⁵ Additionally, the Court has established an emergency exception to admit physical evidence derived from *Miranda*-defective confessions.¹⁷⁶ The Court justified these exceptions by reasoning that the goal of deterrence is not always adequately served by excluding relevant evidence.¹⁷⁷

As mentioned in the Introduction, the exclusionary rule is not limited to evidence obtained *directly* from a constitutional violation.¹⁷⁸ Rather, it excludes all evidence *derived* from a Constitutional violation as long as there is a sufficient connection between the proffered evidence and the illegality.¹⁷⁹ The Court articulated this concept in the landmark case of *Wong Sun v. United States*.¹⁸⁰ In that case, the police performed an illegal search of an individual's apartment.¹⁸¹ In so doing, they learned of that individual's participation in the sale of narcotics, which led agents to question another person who actually possessed the narcotics.¹⁸² After arresting this second individual for possession of narcotics, he implicated the

¹⁷² *United States v. Leon*, 468 U.S. 897 (1984) (establishing a limited good faith exception for searches conducted pursuant to a warrant that is later found to be invalid).

¹⁷³ *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975); *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963).

¹⁷⁴ *Murray v. United States* 487 U.S. 533, 537-38 (1988); *Segura v. United States*, 468 U.S. 796, 805 (1984).

¹⁷⁵ *Nix*, 467 United States at 448 (1984). These exceptions come into play when the prosecution seeks to offer illegally obtained evidence in its case in chief. Separate rules and exceptions apply when the prosecution seeks to introduce such evidence for impeachment purposes. See *United States v. Havens*, 446 U.S. 620, 627-28 (1980); *Walder v. United States*, 347 U.S. 62, 65 (1954).

¹⁷⁶ *New York v. Quarles*, 467 U.S. 649, 655-56 (1984).

¹⁷⁷ *Brown v. Illinois*, 422 U.S. 590, 610 (Powell, J., concurring) (focusing on the deterrent purpose of the exclusionary rule); *United States v. Leon*, 468 U.S. 897, 916 (1984) (reasoning that there is "no basis . . . for believing that exclusion of evidence seized pursuant to a warrant will have a significant deterrent effect").

¹⁷⁸ See *supra* note 8.

¹⁷⁹ See *supra* note 8.

¹⁸⁰ 371 U.S. 471 (1963).

¹⁸¹ *Id.* at 486.

¹⁸² *Id.* at 487.

defendant Wong Sun.¹⁸³ Officers went to Wong Sun's dwelling, gained admittance, and arrested Wong Sun.¹⁸⁴ Wong Sun was subsequently released, but returned to the police station voluntarily three days later and signed a statement.¹⁸⁵ The Court suppressed the statement from the first individual and the narcotics found on the second individual, but admitted Wong Sun's statement.¹⁸⁶ Although the Court considered the excluded evidence fruits of the primary illegal arrest, it concluded that Wong Sun's statement was not an illegal fruit because there was an intervening independent act of free will—i.e., Sun's returning to the police station voluntarily. The Court found this sufficient to purge the taint of the primary illegality.¹⁸⁷

The derivative evidence doctrine also developed originally in the Fourth Amendment context,¹⁸⁸ but has been used on a limited basis in the Fifth¹⁸⁹ and Sixth Amendment¹⁹⁰ contexts as well. As *Wong Sun* illustrates, the test for admissibility is whether the secondary evidence was obtained through exploitation of the initial illegality or by means sufficiently attenuated to remove the taint.¹⁹¹ The burden is on the government to show that the case falls into one of these exceptions.¹⁹²

¹⁸³ *Id.* at 475.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 475-77, 476 n.3, 491.

¹⁸⁶ *Wong Sun*, 371 U.S. at 487-91.

¹⁸⁷ *Id.* at 491.

¹⁸⁸ *See id.* at 484-85; *Nardone v. United States*, 308 U.S. 338, 340 (1939); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 391-92 (1920).

¹⁸⁹ *See United States v. Patane*, 124 S. Ct. 2620, 2626-27 (2004) (citing *United States v. Hubbell*, 530 U.S. 27, 37 (2000); *Missouri v. Seibert*, 124 S. Ct. 2601, 2608 (2004); *Oregon v. Elstad*, 470 U.S. 298, 304 (1985); *Michigan v. Tucker*, 417 U.S. 433, 438 (1974)).

¹⁹⁰ *See Nix v. Williams*, 467 U.S. 431, 442 (1984); *United States v. Wade*, 388 U.S. 218, 220 (1967).

¹⁹¹ *Wong Sun*, 371 U.S. at 486 (holding that suppression of fruits is required unless there was "an act of free will [sufficient] to purge the primary taint of the unlawful invasion"). *See Kaupp v. Texas*, 538 U.S. 626, 632-33 (2003); *New York v. Harris*, 495 U.S. 14, 20 (1990); *Taylor v. Alabama*, 457 U.S. 687, 690 (1982); *Rawlings v. Kentucky*, 448 U.S. 98, 107 (1980); *Dunaway v. New York*, 442 U.S. 200, 204 (1979); *Brown v. Illinois*, 422 U.S. 590, 599 (1975).

¹⁹² *Kaupp*, 538 U.S. at 633.

B. *Justifications for the Exclusionary Rule: Mapp and Miranda versus Massiah*

The current conception of the Fourth Amendment exclusionary rule is that exclusion is neither a personal right, a remedy for a past wrong, nor even tied to the preservation of the adversarial system.¹⁹³ The exclusionary rule is employed in the Fourth Amendment context solely to deter future unreasonable searches and seizures by police.¹⁹⁴ The *Miranda* exclusionary rule is similarly premised only on deterrence.¹⁹⁵ In both contexts, exclusion is a court-created remedy that is not grounded in the language of the Constitution. As a result, admitting evidence obtained in violation of the Fourth Amendment or *Miranda* does not directly violate the Constitution, which makes carving out exceptions to these rules easier for the Court to justify.

In contrast, the Sixth Amendment exclusionary rule is a different species all together—one more akin to the Fifth Amendment due process exclusionary rule¹⁹⁶ than the *Miranda* exclusionary rule.¹⁹⁷ When first announced, the *Massiah* Court determined that a violation of the defendant's Sixth Amendment right to counsel occurred only at the time that the

¹⁹³ *Mapp v. Ohio*, 367 U.S. 643, 655-57 (1961) (citing *Elkins v. United States*, 364 U.S. 206, 217 (1960)); *Weeks v. United States* 232 U.S. 383, 390 (1914) (citing *Boyd v. United States*, 116 U.S. 616 (1886)) *overruled by* *Mapp v. Ohio*, 367 U.S. 643.

¹⁹⁴ *Oregon v. Elstad*, 470 U.S. 298, 306 (1985) (“The purpose of the Fourth Amendment exclusionary rule is to deter unreasonable searches, no matter how probative their fruits.”) (citing *Dunaway v. New York*, 442 U.S. 200, 216-17 (1979); *Brown*, 422 U.S. at 600-02); *Elkins*, 364 U.S. at 217 (“The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.”).

¹⁹⁵ It is important to note the difference between the Fifth Amendment exclusionary rule and the *Miranda* exclusionary rule. The Fifth Amendment has a built-in exclusionary remedy. The text itself states that no defendant can be compelled to give incriminating testimony about himself. U.S. CONST. amend. V. Thus, where police obtain compelled statements or confessions they are automatically excluded from trial. *Elstad*, 470 U.S. at 304-05. The *Miranda* exclusionary rule, on the other hand, is a court-created remedy that comes into play when government officials violate the strictures of *Miranda*. *See Id.* *See generally* *Miranda v. Arizona*, 384 U.S. 436 (1966). The distinction between a constitutionally based rule and a court created one cannot be overemphasized.

¹⁹⁶ *See infra* note 188; *Mincey v. Arizona*, 437 U.S. 385, 397-98 (1978) (distinguishing, for the purposes of exclusion, between a procedural *Miranda* violation and true coercion; use of any involuntary statement should never be admitted in any way against a defendant).

¹⁹⁷ Statements can be used for impeachment purposes if their “trustworthiness . . . satisfies legal standards.” *Harris v. New York*, 401 U.S. 222, 224 (1971); *Oregon v. Hass*, 420 U.S. 714, 722 (1975) (quoting *Harris*, 401 U.S. at 224).

wrongfully obtained evidence was admitted at trial.¹⁹⁸ Linking the violation to the admission of evidence demonstrates the Court's belief that exclusion is a personal right inextricably tied to the Sixth Amendment right itself. In *Nix v. Williams*, the Court justified its decision to admit fruits of illegally obtained evidence based on a cost-benefit analysis of the deterrence theory. At the same time, the Court accepted the defendant's argument that exclusion is a present protection of the right to a fair trial.¹⁹⁹ Thus, the current conception of the Sixth Amendment exclusionary remedy is that it serves two important functions: (i) maintaining the integrity of the adversary system by remedying the Constitutional violation and (ii) deterring future violations.²⁰⁰

C. *Fruits of the Poisonous Tree Doctrine and Miranda*

The Court has severely limited the exclusionary impact of *Miranda* on the fruits of confessions by relying on two main propositions: (i) that exclusion of the fruit of a poisonous tree is justified only if a constitutional right is violated and (ii) that a violation of *Miranda* is not, by itself, a violation of the Fifth Amendment.²⁰¹

In *Michigan v. Tucker*,²⁰² the police arrested the defendant for rape and advised him of his right to remain silent and to an attorney.²⁰³ However, the officer did not inform Tucker that he could have an attorney present if he was indigent.²⁰⁴ The defendant gave an alibi for the time of the crime: that he was with his friend Henderson.²⁰⁵ When the police spoke to Henderson, he made incriminating statements implicating Tucker.²⁰⁶ Tucker moved to suppress Henderson's

¹⁹⁸ *Massiah v. United States*, 377 U.S. 201, 206 (1964).

¹⁹⁹ *Nix v. Williams*, 467 U.S. 431, 446-48 (1984) (acknowledging that the Sixth Amendment right to counsel ensures the reliability of proffered evidence, but finding that the admission of physical evidence that would be inevitably discovered does not infringe on the integrity or fairness of a trial).

²⁰⁰ See *United States v. Henry*, 447 U.S. 264, 282 n.6 (1980) (Blackmun, J., dissenting) (writing that "*Massiah* imposes the exclusionary sanction on that conduct that is most culpable, most likely to frustrate the purpose of having counsel, and most susceptible to being checked by a deterrent").

²⁰¹ See *Oregon v. Elstad*, 470 U.S. 298, 306-07 (1985); *Michigan v. Tucker*, 417 U.S. 433, 444 (1974).

²⁰² 417 U.S. 433 (1974).

²⁰³ *Id.* at 436.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 436-37.

statement due to the deficiency in his own *Miranda* warnings.²⁰⁷ The Court rejected his argument, however, and admitted the evidence.²⁰⁸ The Court concluded that the exclusionary rule does not require suppression of reliable evidence when a procedural oversight in the administration of *Miranda* warnings occurs because such an error does not necessarily render a suspect's statements involuntary.²⁰⁹ The Court extended the reasoning of *Tucker* to second confessions obtained after a *Miranda*-defective confession in *Elstad*. The Court admitted Elstad's second confession finding suppression inappropriate "[s]ince there was no actual infringement of the suspect's constitutional rights," and therefore "the doctrine expressed in *Wong Sun* that fruits of a constitutional violation must be suppressed" did not control in this case.²¹⁰

V. ANALYSIS

A. *The Derivative Evidence Rule Applies to Sixth Amendment Violations*

While originally articulated and developed in the Fourth Amendment context, the Court's subsequent jurisprudence has made clear that the derivative evidence rule also applies to the Sixth Amendment.²¹¹ The most straightforward application of the rule occurred in *Wade*.²¹² There, the Court held that a defendant is entitled to the assistance of counsel at pre-trial line-ups determining that the admissibility of in-court identifications must be governed by the *Wong Sun*²¹³ exclusion rule.²¹⁴ Then in *Nix*,²¹⁵ the Court admitted the body of a murder victim that the police discovered after deliberately eliciting its whereabouts from the defendant in the absence of counsel.²¹⁶ While the defendant's actual statements were excluded, the Court held that the condition of the body could be admitted at

²⁰⁷ *Id.* at 437.

²⁰⁸ *Tucker*, 417 U.S. at 437.

²⁰⁹ *See id.* at 444-45.

²¹⁰ *Oregon v. Elstad*, 470 U.S. 298, 308 (1985).

²¹¹ *See, e.g., Murray v. United States*, 487 U.S. 533, 537 (1988) (noting that the fruits doctrine had been applied in the Sixth Amendment context); *Nix v. Williams*, 467 U.S. 431, 448 (1984); *United States v. Wade*, 388 U.S. 218, 235-36 (1967).

²¹² 388 U.S. 218 (1967).

²¹³ 371 U.S. 471 (1963).

²¹⁴ *Wade*, 388 U.S. at 241.

²¹⁵ 467 U.S. 431 (1984).

²¹⁶ *Id.* at 437.

trial even though it was a fruit of the Sixth Amendment violation.²¹⁷ The Court found that since the police had already formed a search party to look for the victim, they would have “inevitably” discovered the body.²¹⁸ *Nix*, albeit convolutedly, also demonstrates the Court’s application of the derivative evidence rule in the Sixth Amendment context. The *Nix* inevitable discovery exception only makes sense if in fact the derivative evidence rule bears on Sixth Amendment violations. Indeed, if there was no Sixth Amendment derivative evidence rule, then the Court would not have been compelled to create the exception that it did in *Nix*.

What distinguishes the derivative evidence rule in the Sixth Amendment context from its Fourth Amendment counterpart, however, is its justification. When invoking either the Fourth Amendment exclusionary rule—direct or derivative—the Court has come to focus solely on the deterrence rationale: “[both rules are] calculated to prevent, not to repair. . . . [Their] purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.”²¹⁹ Indeed, such a justification makes sense. If the police officers know that the fruits of their labors will be disregarded unless they follow proper procedures, then they are less likely to conduct illegal searches and seizures in the first place. This rationale is also a workable concept in the Sixth Amendment context. If police and prosecutors know that incriminating evidence will be excluded at trial if a defendant’s Sixth Amendment rights are violated, then they will be less likely to interfere with an indicted defendant’s right to counsel.

Beyond this, however, the Court’s opinions make known that the Sixth Amendment exclusionary rules serve a purpose in addition to deterrence.²²⁰ The Sixth Amendment, in conjunction with the Fourteenth Amendment, guarantees the right to counsel at every critical stage of a prosecution.²²¹ The right has been described as “indispensable,”²²² in fact “vital,”²²³

²¹⁷ *Id.* at 446-47.

²¹⁸ *Id.* at 448-50.

²¹⁹ *Michigan v. Tucker*, 417 U.S. 433, 446 (1974) (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)).

²²⁰ *Nix*, 467 U.S. at 442-47; *United States v. Henry*, 447 U.S. 264, 282 (1980) (Blackmun, J., dissenting).

²²¹ *United States v. Wade*, 388 U.S. 218, 224 (1967); *Powell v. Alabama*, 287 U.S. 45, 57 (1932).

²²² *Maine v. Moulton*, 474 U.S. 159, 168 (1985).

to the fair administration of our adversary system of criminal justice. The entire line of *Massiah* cases has been decided on the premise that admitting statements deliberately elicited from a defendant in the absence of counsel denies the defendant the basic protections of the right.²²⁴ If this is so, then the use of the fruits of such a violation likewise exploits the defendant's uncounseled status to his subsequent disadvantage at trial. It follows then, that the Sixth Amendment exclusionary rule and derivative evidence rule, in addition to deterrence, function to preserve the fair trial rights of defendants, and as such, the integrity of the entire criminal system.

Here again, *Nix* is instructive in a roundabout way. There, the petitioner argued that the Sixth Amendment exclusionary rule's additional purpose made the "societal costs"—the competing interest of effective law enforcement—of excluding evidence irrelevant.²²⁵ The Court disagreed with the petitioner's argument, but only because the evidence that he sought to exclude was (i) physical and (ii) would have been discovered anyway.²²⁶ The Court stated that the police conduct "did nothing to impugn the reliability of the evidence in question [Therefore] [s]uppression, in these circumstances, would do nothing whatever to promote the integrity of the trial process . . . [or] ensure fairness."²²⁷ The Court did not reject outright the petitioner's assertion that the Sixth Amendment exclusionary rule serves a purpose other than deterrence. Rather, the Court acknowledged and accepted such a justification, but found that exclusion of the evidence did not further this interest under the circumstances.²²⁸ In fact, excluding evidence that the police would have discovered anyway actually places them in a worse position than they would have been.²²⁹ The Court's consistent use of the deterrence rationale—or rather the lack-of-deterrence rationale—to admit evidence that would otherwise be excluded, suggests that this added justification sets a higher bar of

²²³ *Brewer v. Williams*, 430 U.S. 387, 398 (1977).

²²⁴ *Fellers v. United States*, 540 U.S. 519, 523-24 (2004); *Kuhlmann v. Wilson*, 477 U.S. 436, 457 (1986); *Moulton*, 474 U.S. at 176; *Henry*, 447 U.S. at 270; *Brewer*, 430 U.S. at 400-01; *Massiah v. United States*, 377 U.S. 201, 206 (1964).

²²⁵ *Nix*, 467 U.S. at 446.

²²⁶ *Id.* at 446-47.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.* at 447.

admission for evidence obtained in violation of the Sixth Amendment.

B. The Elstad Exception is not Applicable in the Sixth Amendment Context

While the foregoing discussion certainly bolsters the assertion that the *Elstad* exception does not and could not apply in the Sixth Amendment context, the Eighth Circuit disagreed, finding that violations of the *Miranda* rule and the Sixth Amendment are not fundamentally different.²³⁰ Yet a close examination of the text of the *Elstad* decision itself reveals the Eighth Circuit's egregious error. To reiterate, the *Elstad* majority held that the defendant's second statement, made after he had given a first, unwarned statement, was admissible in the prosecution's case in chief, because it was the product of a voluntary, knowing, and intelligent waiver.²³¹ Relying on the reasoning of *Tucker*, the Court held that a procedural violation of *Miranda* does not create a presumption of coercion and that the subsequent reading of *Miranda* remedies any taint resulting from such a procedural failure.²³² The *Elstad* decision thus establishes two criteria that must be met in order to trigger the exception: (i) the primary illegality must not be of constitutional magnitude and (ii) there must be no deliberate coercion or improper police practice in obtaining the initial statement.²³³ As will be shown below, the facts of *Fellers* fail both of these prongs.

The *Elstad* Court began hewing the "fruit of the poisonous tree" doctrine early on in the opinion. Writing for the majority, Justice O'Connor stated that the fruits metaphor is "misleading" when taken out of context, as the majority found it was in this case.²³⁴ The only appropriate situation in which to apply the fruits doctrine is in cases involving a constitutional violation. Again, the Court's analysis hinges on the characterization of *Miranda* as a mere prophylactic rule. The Court went on to say that the lower court incorrectly assumed "that a failure to administer *Miranda* warnings necessarily breeds the same consequences as police

²³⁰ United States v. Fellers, 397 F.3d 1090, 1093 (8th Cir. 2005).

²³¹ Oregon v. Elstad, 470 U.S. 298, 318 (1985).

²³² *Id.* at 314.

²³³ *See id.* at 309.

²³⁴ *Id.* at 303-04.

infringement of a constitutional right, so that evidence uncovered following an unwarned statement must be suppressed as ‘fruit of the poisonous tree.’”²³⁵ Equating these two wrongs, the Court explains, fails to recognize the nature of the *Miranda* protections.²³⁶ In essence, the failure of police to advise suspects of their *Miranda* rights does not directly violate the Fifth Amendment.²³⁷

O’Connor also cautioned the lower courts to distinguish between the role of the Fourth Amendment exclusionary rule—to deter unreasonable searches no matter how probative their fruits—and the function of *Miranda*—to protect the right against self-incrimination.²³⁸ In *Taylor v. Alabama*, the Court held that “[any] confession obtained through custodial interrogation after an illegal arrest should be excluded unless intervening events break the causal connection between the illegal arrest and the confession so that the confession is ‘sufficiently an act of free will to purge the primary taint.’”²³⁹ But because *Elstad* does not involve a constitutional violation, the Court refused to apply the fruits doctrine. Instead, it turned to its reasoning in *New York v. Quarles* and *Tucker*: that a procedural *Miranda* violation differs significantly from violations of the Fourth Amendment.

Specifically, the Court noted that violations of the Fourth Amendment mandate broad application of the fruits doctrine because it serves “interests and policies that are distinct from those it serves under the Fifth.”²⁴⁰ Whereas the Fourth Amendment exclusionary rule is aimed directly at preventing illegal searches, the *Miranda* exclusionary rule has broader implications than the Amendment it is meant to uphold. To illustrate, the failure to read *Miranda* automatically creates a presumption of compulsion. Therefore, statements made without a warning are suppressed without question. As a result, voluntary statements could be suppressed just because they are unwarned even though they

²³⁵ *Id.* at 304.

²³⁶ *Elstad*, 470 U.S. at 304.

²³⁷ As discussed earlier, the Court’s decision in *Dickerson* has invalidated this analysis. See *supra* notes 87-90 and accompanying text. But, more recently in *Patane*, the Court upheld the *Elstad* exception. The effect of the *Dickerson* and *Patane* decisions will be addressed later in this section. See *infra* p. 34.

²³⁸ *Elstad*, 470 U.S. at 304.

²³⁹ *Taylor v. Alabama*, 457 U.S. 687, 690 (1982) (quoting *Brown v. Illinois*, 422 U.S. 590, 602 (1975)).

²⁴⁰ *Elstad*, 470 U.S. at 306.

were not actually compelled.²⁴¹ But, the Fifth Amendment only protects against the use of compelled statements.²⁴²

The Court went on to state that absent any showing of deliberately coercive or improper tactics in obtaining the initial statement,

the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion . . . [and] subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement.²⁴³

Thus, the failure to provide *Miranda* warnings creates a rebuttable presumption of compulsion. It does not infringe upon a suspect's constitutional rights, unless there is an actual showing of coercion.²⁴⁴ And, where there is no evidence of coercion in obtaining the first statement, the Court sees little concern that coercion provoked the second statement. As a result, the Court concluded that the *Miranda* exclusionary rule can not require that statements and their fruits be discarded automatically as inherently tainted. Errors in administering prophylactic *Miranda* procedures should not have the same "irremediable consequences" as police infringement on the Fifth Amendment itself.²⁴⁵

When the police read Elstad his *Miranda* rights at the station, it remedied any taint present in the first unwarned statement because it was uncoerced. After being so advised, he voluntarily waived his right to remain silent and his right to counsel. Elstad proceeded to speak with law enforcement officials during which time he made incriminating statements. While a fruit of the first confession, this second and uncoerced statement exacts a high cost from law enforcement while doing little to protect the defendant against self-incrimination. Thus the cost is high and deterrent effect low—an equation that has consistently added up to admission in the Court's exclusionary jurisprudence.²⁴⁶

²⁴¹ *Id.* at 306-07.

²⁴² *Id.*

²⁴³ *Id.* at 314.

²⁴⁴ *See id.* at 306-07.

²⁴⁵ *Id.* at 309.

²⁴⁶ *See Elstad*, 470 U.S. at 312; *United States v. Leon*, 468 U.S. 897, 922 (1984); *United States v. Havens*, 446 U.S. 620, 626 (1980); *Brown v. Illinois*, 422 U.S. 590, 609 (1975); *United States v. Calandra*, 414 U.S. 338, 354 (1974); *Harris v. New*

Contrary to the Eighth Circuit's holding, applying the analysis laid out in *Elstad* to the facts of *Fellers* does not yield the same result. The *Elstad* Court began by imploring the lower courts not to obscure the differences between the Fourth Amendment exclusionary rule and *Miranda*. But the differences acknowledged by the Court are not of the same magnitude when comparing the Fourth and the Sixth Amendment exclusionary rules. Firstly, the Sixth Amendment exclusionary rule is a personal right tied directly to the enforcement of the Amendment's protection itself. Allowing evidence that was obtained as a result of a violation of the defendant's right to counsel to be admitted at trial, or used to uncover other evidence that is then used at trial, renders the right essentially meaningless. Secondly, the Sixth Amendment exclusionary rule does not present the same dilemma that the *Miranda* exclusionary rule does, namely overbreadth. The Sixth Amendment exclusionary rule does not reach broader than the Sixth Amendment itself. Rather, the exclusionary rule ensures that all rights guaranteed under the Sixth Amendment, which together ensure the right to a fair trial, are protected. Finally, there is nothing merely procedural about violating the Sixth Amendment right to counsel. Since it is specifically accorded in the text of the Constitution, failing to honor that right directly violates the Constitution. Based on this alone, *Fellers* would seem to fall outside the bounds of the *Elstad* exception.

Elstad clearly states that to trigger the fruits doctrine—as opposed to the *Elstad* exception to the fruits doctrine—the primary illegality must be of constitutional magnitude and there must be no intentional misconduct. In addition to the violation at issue in *Fellers* being a constitutional one, the police officers obtained *Fellers*' initial statement through deliberate and improper tactics. Remember, the main rationale behind the exclusionary rule is deterrence. In cases involving the timing of the *Miranda* warning, the Court has tended to be forgiving.²⁴⁷ Indeed, police officers are not lawyers. There have been situations in which the Court has found a

York, 401 U.S. 222, 225 (1971); *Alderman v. United States*, 394 U.S. 165, 174-75 (1969).

²⁴⁷ “[T]he task of defining ‘custody’ is a slippery one, and ‘policemen investigating serious crimes [cannot realistically be expected to] make no errors whatsoever.’” *Elstad*, 470 U.S. at 309 (quoting *Michigan v. Tucker*, 417 U.S. 433, 446 (1974)) (alteration in original). See *New York v. Quarles*, 467 U.S. 649, 657-58 (1984).

suspect to be in custody or under interrogation, thus triggering the application of *Miranda*, but where an average police officer would not have known as much.²⁴⁸ A similar situation occurred in *Elstad*. The officers, while admitting retrospectively that Elstad was in custody, testified that they went to Elstad's home solely to inform his mother about what was happening, not to interrogate Elstad. The Court took stringent notice of surrounding factors, like the time of day and the comforting environment of his own home, to bolster the notion that the arresting officers were acting in good faith when Elstad made the first unwarned and incriminating admission.²⁴⁹

In contrast, officers violate the Sixth Amendment right to counsel when they "deliberately elicit" information from an indicted defendant in the absence of counsel. The Court has held that deliberate elicitation differs significantly from the functional equivalent of interrogation concept.²⁵⁰ One such difference is the standard's focus on the officer's actions. As the Court has already held, the officers in *Fellers* went to Fellers' home with the sole intention of deliberately eliciting information from him. Thus, the police used improper tactics in obtaining Fellers' initial incriminating statements. The Eighth Circuit found that suppressing the statement Fellers made in his home sufficiently deterred the Sixth Amendment violations because

the officers acknowledged that they used Fellers' initial jailhouse statements (obtained after securing a *Miranda* waiver) in order to extract further admissions from him, . . . [but did not make] reference to Fellers' prior uncounseled statements in order to prompt him into making new incriminating statements.²⁵¹

This reasoning completely ignores the logic underlying the *Elstad* exception, that while the deterrent effect of the exclusionary rule is arguably lacking when the police are acting in good faith, there is no question that the exclusionary rule serves its purpose when the police blatantly act in bad

²⁴⁸ See *Stansbury v. California*, 511 U.S. 318, 323 (1994) (holding that "the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned"); *Pennsylvania v. Muniz*, 496 U.S. 582, 592-93 (1990) (holding that when the physical nature of tests begin to elicit communicative responses, it constitutes interrogation for *Miranda* purposes).

²⁴⁹ *Elstad*, 470 U.S. at 315.

²⁵⁰ See *supra* notes 125-27.

²⁵¹ *United States v. Fellers*, 397 F.3d 1090, 1095-96 (8th Cir. 2005).

faith, as they did in *Fellers*. Allowing the police to remedy their blatant disregard for the Constitution by *Mirandizing* *Fellers* defies common sense and misinterprets precedent.

In *Elstad*, the Court rejected *Elstad*'s argument that he had confessed the second time out of psychological compulsion. *Elstad*'s argument was based on the "cat-out-of-the-bag" theory announced in *United States v. Bayer*.²⁵² The theory is that

[once a suspect confesses,] no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as the fruit of the first.²⁵³

The *Elstad* Court reasoned, however, that the psychological pressure that exists after making a voluntary statement is neither the type of coercion that *Bayer* referred to nor that the Fifth Amendment protects against. Since *Elstad*'s first statement was not coerced, but rather given voluntarily, receiving the *Miranda* warning at the police station was enough to remedy the initial wrong.²⁵⁴ When considered in light of the Sixth Amendment, however, the cat-out-of-the-bag theory is not so easily disposed.

Furthermore, the fact that the Court has, as the Eighth Circuit points out, on one occasion, applied similar waiver analysis to Fifth and Sixth Amendment rights to counsel does not suggest that the rights are similar for purposes of the fruits doctrine.²⁵⁵ The reading of *Miranda* in the *Fellers* case does not remove the taint from the prior Sixth Amendment violation and thus does not justify the same result. The Court, hearkening back to *Powell*, has consistently held that defendants need the "guiding hand of counsel" to restore the imbalance between them and the government.²⁵⁶ The reading of *Miranda* can do neither. While the Eighth Circuit certainly downplays the role of counsel at post-indictment questioning, its own acknowledgment that "the scope of the right to counsel varies depending upon the usefulness of counsel to the accused

²⁵² 331 U.S. 532 (1947).

²⁵³ *Id.* at 540.

²⁵⁴ *Elstad*, 470 U.S. at 314.

²⁵⁵ *Patterson v. Illinois*, 487 U.S. 285, 296-97 (1988) (holding that where an indicted defendant has not requested to speak with counsel, the reading of the *Miranda* warning is sufficient to inform him of the right so that he can make a knowing and intelligent waiver).

²⁵⁶ *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

at a particular proceeding and the dangers to the accused of proceeding without counsel” belies this assertion.²⁵⁷ If Fellers had an opportunity to consult with counsel, then his lawyer could have told him not to answer the questions put to him by police in his home or his lawyer could have advised him that the statements he made at his home, in the absence of his attorney, could not be used against him at his trial. Either scenario illustrates the important role that counsel could have played in *Fellers*.

Finally, the Eighth Circuit’s reliance on *Patterson v. Illinois* is misplaced; *Patterson* does not govern *Fellers*. In *Patterson*, police arrested the defendant as a suspect in a murder and a grand jury indicted him soon after.²⁵⁸ At this point, Patterson was entitled to his right to counsel under the Sixth Amendment. Before questioning him, the police read Patterson his *Miranda* rights, and he waived them.²⁵⁹ At trial, Patterson argued that *Miranda* was not sufficient to warn him of his Sixth Amendment right to counsel, so therefore he could not have knowingly and intelligently waived that right.²⁶⁰ However, since Patterson had never even asked to speak with an attorney, the Court rejected this argument.²⁶¹ The Court held, instead, that receiving the *Miranda* warning sufficiently informed him of his right to counsel under the Sixth Amendment.²⁶² But, in *Patterson* there was no primary illegality before the defendant made incriminating statements, which renders *Patterson* virtually meaningless in evaluating *Fellers*. Absent the primary illegality, the Court did not consider whether Patterson’s waiver of his right to counsel was made voluntarily, only if it was made knowingly and intelligently. While Fellers did not request to speak with an attorney either, the facts of *Fellers* have not foreclosed the voluntariness question. As the aforementioned analysis demonstrates, the primary illegality created a degree of coercion that would render his subsequent waiver of the right involuntary as well as unknowing and unintelligent.

²⁵⁷ United States v. Fellers, 397 F.3d 1090, 1096 (8th Cir. 2005) (citing *Patterson*, 487 U.S. at 298).

²⁵⁸ *Patterson*, 487 U.S. at 288.

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 289.

²⁶¹ *Id.* at 290-91.

²⁶² *Id.* at 294.

While some have asserted that the Court's decision in *Patterson* reflects an attitude of diminished protection for the Sixth Amendment right to counsel, the Court carefully limited its holding and even left open a loophole in footnote nine.²⁶³ The Court reassured readers that the similar waiver standard was limited to the post-indictment questioning context. Justice White wrote that, in general, where a suspect has been advised of his *Miranda* rights, he will be presumed to have been "knowing and intelligent" in his waiver, but "[not] all Sixth Amendment challenges to the conduct of postindictment questioning will fail whenever the challenged practice would pass constitutional muster under *Miranda*."²⁶⁴ Furthermore, the majority did not reject the idea that courts require extra warnings to be given about waiving the Sixth Amendment right to counsel. Rather, it stated that as of then, the Court had not been presented with convincing enough language. Both of these facts demonstrate the Court's continued emphasis on the paramount importance of the Sixth Amendment right.

Based on the Court's own reasoning, the *Elstad* exception is inapplicable to *Fellers* in particular and the Sixth Amendment in general. But that is not where this analysis ends. In a post-*Dickerson* world—where the Court has overruled the notion of *Miranda* as a mere prophylactic rule—the Court's reasoning in *Elstad* appears invalid. The Court, while not going as far as to say that a *Miranda* violation is a constitutional violation, has held that *Miranda* is a "constitutional decision."²⁶⁵ Initially, one might conclude that *Miranda*'s newly declared constitutional status subjects its prior exceptions, including the applicability of the fruits doctrine, to review. But despite its characterization of *Miranda* the Court has reaffirmed the *Elstad* exception.²⁶⁶ The Court's affirmation can only lead to one conclusion: that the Court is now relying on a cost-benefit analysis to justify its holding.

Yet even when employing this rationale—whether the cost of exclusion outweighs the protection of the individual's interest—in the Sixth Amendment context, the *Elstad* exception is still inapplicable. The purpose of the Sixth

²⁶³ *Id.* at 296-97 n.9.

²⁶⁴ *Patterson*, 487 U.S. at 296 n.9.

²⁶⁵ *Dickerson v. United States*, 530 U.S. 428, 432 (2000).

²⁶⁶ *United States v. Patane*, 124 S. Ct. 2620, 2622 (2004).

Amendment exclusionary rule is more than just deterrence. The exclusionary rule is a necessary component of the right to counsel, which the Court has recognized as a fundamental right.²⁶⁷ Therefore, while the cost of exclusion may still be high, the cost of inclusion is even higher. Admitting evidence obtained directly or indirectly in violation of the Sixth Amendment would allow the right to counsel to be too easily circumvented. This would infringe on a defendant's right to a fair trial; a cost that always tips the scale in favor of exclusion. Certainly, ensuring accurate outcomes and fair processes are interests superior to the goal of securing convictions.

C. *The Admissibility of Fellers' Second Confession Should Turn on a Traditional Fruit of the Poisonous Tree Analysis*

Since the *Elstad* exception is inapplicable in the Sixth Amendment context, the *Fellers* case must be analyzed using the traditional derivative-evidence rule. Thus, the critical question is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."²⁶⁸ In *Brown v. Illinois*, the Court set forth several factors to consider when determining whether a confession is the product of free will under *Wong Sun*: (i) whether *Miranda* warnings were administered before the confession, (ii) the temporal proximity between the arrest and confession, (iii) the presence of intervening circumstances, and (iv) particularly, the flagrancy of the official misconduct.²⁶⁹

Fellers' second confession was clearly a derivative of the first. While Fellers did receive a *Miranda* warning before making his second confession, all of the other *Brown* factors suggest insufficient attenuation. Fifteen minutes after Fellers made the first incriminating statement, the police transported him to the jailhouse where he made the second statement. There were no other intervening circumstances. In fact, the same officers obtained both statements from Fellers and both

²⁶⁷ *Powell v. Alabama*, 287 U.S. 45, 73 (1932).

²⁶⁸ *Wong Sun v. United States*, 371 U.S. 471, 488 (1963) (quoting JOHN MACARTHUR MAGUIRE, EVIDENCE OF GUILT: RESTRICTIONS UPON ITS DISCOVERY OR COMPULSORY DISCLOSURE 221 (1959)).

²⁶⁹ *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975).

statements referenced the same issues. Finally, the misconduct of the police officers in this situation is obvious. They went to an indicted defendant's house to arrest him, but before doing so attempted to get any bits of information out of him that they could. The officers knew that if Fellers had a lawyer present, he would have been advised not to speak with them. It is precisely this sort of disregard for constitutional principles that the Court has continuously invoked the exclusionary rule to prevent. Therefore, Fellers' second statement must be suppressed, unless the government can prove that it falls into another already established exception.

VI. CONCLUSION

In conclusion, the Fifth and Sixth Amendment rights to counsel are indeed like apples and oranges. By importing the Court's reasoning in *Elstad* to the Sixth Amendment context and admitting the fruits of a Sixth Amendment violation in *Fellers*, the Eighth Circuit has significantly curtailed the protection of the Sixth Amendment right to counsel, despite the fact that history, Supreme Court jurisprudence, and common sense dictate that this should not be the case. The *Elstad* exclusionary rule should be limited to the Fifth Amendment context and cannot be applied to Sixth Amendment violations for three main reasons. First, as illustrated above, the Sixth Amendment right to counsel is a greater, more protected right. Its violation is unquestionably a direct violation of the Constitution. Second, the Sixth Amendment exclusionary rule serves a purpose beyond deterrence. Namely, maintaining the integrity of the trial system itself. It is a constitutionally required remedy. Finally, the Court's reasoning clearly reflects its intention to limit the exception to the Fifth Amendment context. The purpose of the right to counsel is to protect a defendant from being convicted by his own ignorance of legal and constitutional rights. Extending the *Elstad* exception into the Sixth Amendment context does just the opposite.

In 1988, when the Court announced its decision in *Patterson*, some legal scholars viewed the decision as an onslaught of an assault against the Sixth Amendment right to counsel protection, which had always received favor from the

Court.²⁷⁰ Two subsequent decisions—*McNeil v. Wisconsin*²⁷¹ and *Texas v. Cobb*²⁷²—did little to assuage these fears. Some feared that *Massiah* was headed down the same path as *Miranda*.²⁷³ Nonetheless, other scholars have not read these decisions as an attack, but rather as necessary fine-tuning.²⁷⁴ In a piece entitled *Texas v. Cobb: A Narrow Road Ahead for the Sixth Amendment*, the author noted that the only question remaining is how far the Court will go in narrowing the Sixth Amendment right and concluded, “Hopefully, it has gone far enough.”²⁷⁵ Regardless of one’s take on *Patterson*, *McNeil*, or *Cobb*, one issue is not debatable: extending the *Elstad* exception into the Sixth Amendment realm is going too far; it essentially cuts down the fruit of the poisonous tree doctrine at its roots. As every gardener knows, however, plants, even overgrown ones, flourish with careful pruning. Therefore, before other courts chop, they should consider the purpose of the Sixth Amendment. Once they do, they will realize that the fruit of the poisonous tree doctrine must be given a chance to grow. And so, this author respectfully urges courts to make peace with—indeed extend an olive branch to—the fruits of the poisonous tree doctrine by excluding any fruits that result from a violation of a defendant’s Sixth Amendment rights.

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²⁷⁰ See, e.g., John S. Banas, III, *Sixth Amendment—Waiver of the Sixth Amendment Right to Counsel at Post-Indictment Interrogation*, 79 J. CRIM. L. & CRIMINOLOGY 795, 833-34 (1988).

²⁷¹ 501 U.S. 171 (1991).

²⁷² 532 U.S. 162 (2001).

²⁷³ See, e.g., Melissa Minas, *Blurring the Line: Impact of Offense-Specific Sixth Amendment Right to Counsel*, 93 J. CRIM. L. & CRIMINOLOGY 195, 197 (2003); Meredith B. Halama, Note, *Loss of a Fundamental Right: The Sixth Amendment as a Mere “Prophylactic Rule,”* 1998 U. ILL. L. REV. 1207, 1207, 1241-42.

²⁷⁴ See, e.g., Michael E. Crowder, *Texas v. Cobb*, Note, *The United States Supreme Court Limits the Sixth Amendment to Exonerate Innocent Suspects—Police Officers Acting in Good Faith*, 8 TEX. WESLEYAN L. REV. 79, 81 (2001); Michael J. Howe, Note, *Tomorrow’s Massiah: Towards a “Prosecution Specific” Understanding of the Sixth Amendment Right to Counsel*, 104 COLUM. L. REV. 134, 147-50 (2004).

²⁷⁵ Beth G. Hungate-Noland, *Texas v. Cobb: A Narrow Road Ahead for the Sixth Amendment Right to Counsel*, 35 U. RICH. L. REV. 1191, 1223 (2002).

[†] B.A. 2001, Barnard College, Columbia University. This Comment was written in loving memory of my grandfather, Charles J. Cloidt, who, expectantly, gave me my first Black’s Law Dictionary when I was 11 years old. I owe many thanks to Professor William H. Hellerstein for his superior guidance and acute insightfulness into the confusing world of Criminal Procedure. I am especially grateful to my parents—Bonnie and Michael Diana, my best friends—Michael, Melissa, and Carl, and my “Buddy”—Matt, for their unending love and support—without them none of this would have been possible.